

## Missouri Attorney General's Opinions - 1963

Opinion	Date	Topic	Summary
<a href="#">2-63</a>	Mar 5	PUBLIC RECORDS. KANSAS CITY POLICE DEPARTMENT. RIGHT OF INSPECTION.	No right of inspection of public records of the Kansas City Police Department exist either under Sec. 109.180, RSMo 1959, or a common law except for those records expressly required by law to be kept.
<a href="#">5-63</a>	Jan 4	JURORS. JURIES. CRIMINAL COSTS. JURY FEES. TAXATION OF JURORS' FEES.	The State is not liable for any jury fees except such as are taxable as costs pursuant to express statutory authorization. Jurors on the regular panel receive \$6 per day and mileage; jurors not on the regular panel who serve in a case also receive \$6 per day and mileage; and jurors who are summoned in cases described in Sec. 494.120, but do not serve in the trial also receive \$6 per day, and also receive mileage if they have traveled at least one mile. No part of such compensation may be taxed as costs. Jurors not on the regular panel who are summoned in all cases other than those described in Sec. 494.120, but do not serve in the trial receive \$3 per day, and the fees allowed to such jurors are to be taxed as costs in the cases in which they were summoned.
<a href="#">6-63</a>	Jan 4		Opinion letter to the Honorable Michael Kinney
<a href="#">7-63</a>	Jan 4		Opinion letter to the Honorable Charles D. Trigg
<a href="#">8-63</a>	Jan 4	JURORS. JURY FEES. MILEAGE.	Regular jurors who are required to and who actually travel each day for which such mileage is claimed from their place of residence to the courthouse are entitled to mileage as well as per diem for each day of service as such jurors.
<a href="#">10-63</a>	June 14	POINT SYSTEM. DRIVER'S LICENSE. DRIVING WHILE INTOXICATED. FELONY. CRIMINAL LAW. MOTOR VEHICLES.	Under Section 302.302.(7), RSMo Cum. Supp. 1961, 12 points may be assessed only in those cases where an individual has been convicted of driving under influence of intoxicating liquors in violation of Sections 564.420, 564.430 and 564.440, RSMo 1959.
<a href="#">11-63</a>	May 29	NURSING HOMES. BONDS. TOWNSHIPS. COUNTIES.	A county is authorized to issue bonds and purchase and nursing home owned and operated by townships within the county. The county may issue bonds for the construction and equipment of additions to the nursing home. The townships have authority to sell the nursing home. The townships are obligated to pay the bonds issued by the townships for the original purchase and construction of the nursing home.

<a href="#">12-63</a>	Feb 5	SCHOOL RECORDS. MUNICIPAL CORPORATIONS. CONTRACTS. PUBLIC RECORDS. RECORDS.	School districts may be termed "Municipal Corporations". Records and contracts required by statute to be kept by school districts are within the scope and effect of Sections 109.180 and 109.190 RSMo. Cum. Sup. 1961, and are open to inspection at all reasonable times. Records required to be maintained by statute are "public records".
<a href="#">13-63</a>	Jan 4		Opinion letter to the Honorable John A. Honssinger
16-63	Oct 14		WITHDRAWN
<a href="#">17-63</a>	Jan 22		Opinion letter to the Honorable John A. Honssinger
19-63	Sept 10		WITHDRAWN
<a href="#">20-63</a>	Jan 21		Opinion letter to the Honorable Robert A. Bonney
<a href="#">22-63</a>	Feb 28	NOT FOR PROFIT CORPORATIONS. CORPORATIONS. SECRETARY OF STATE. NAMES. DISCRETION.	It is the opinion of this office that in a case wherein the Secretary of State determines that the requested name of a Not For Profit Corporation is one so similar to a name previously on file in his office so as to mislead or deceive the general public or persons he may refuse to file such name.
<a href="#">24-63</a>	Feb 5		Opinion letter to the Honorable Edgar J. Keating
25-63	Jan 18		WITHDRAWN
<a href="#">26-63</a>	Jan 30	ESCHEAT. REAL PROPERTY.	The County Collector may not sell for delinquent taxes land which has escheated to the State in accordance with Section 470.010 RSMo 1959. Title to such property vests in the State immediately upon the death of the former owner and Section 470.060 et seq. merely outlines the formal procedure necessary to secure a judicial determination that the title has in fact vested.
<a href="#">27-63</a>	Jan 24	CREDIT UNIONS.	Missouri credit unions are authorized to invest their funds in bonds of school districts.
<a href="#">30-63</a>	Jan 24	OPERATOR'S LICENSE. MOTOR VEHICLES. DRIVER'S LICENSE.	Wife and minor children of a person in military service stationed in Missouri who have a valid operator's license of the state of his residence are not required to obtain an operator's license from this state.
<a href="#">32-63</a>	Jan 16		Opinion letter to the Honorable Charles G. Hyler
<a href="#">35-63</a>	Apr 12		Opinion letter to the Honorable R. B. Mackey
41-63	Jan 23		WITHDRAWN
42-63	Feb 5		WITHDRAWN
<a href="#">45-63</a>	Jan 7		Opinion letter to the Honorable John M. Dalton



47-63	July 26		WITHDRAWN
<a href="#">49-63</a>	Jan 24		Opinion letter to the Honorable Gerald Kiser
<a href="#">51-63</a>	Jan 4		Opinion letter to the Honorable William W. Hoertel
<a href="#">56-63</a>	Jan 3		Opinion letter to the Honorable L. F. Cottey
<a href="#">59-63</a>	Oct 23	TAXATION. ASSESSMENTS. AUTOMOBILES. PERSONAL PROPERTY. MOTOR VEHICLES. LEASED MOTOR VEHICLES. CORPORATIONS.	Motor vehicles situated or held in Livingston Co. which are owned by a domestic or foreign corporation doing business in this state or which are leased to a corporate lessee doing business in this state or which are leased to an individual residing in Livingston Co., are subject to assessment or taxation in Livingston Co. even though taxes have been paid on such motor vehicle in another state. Such motor vehicles are assessable in Livingston Co. to the corporate lessor doing business in this state or to the corporate lessee doing business in this state or the individual lessee residing in Livingston Co.
<a href="#">62-63</a>	Dec 5		Opinion letter to the Honorable Paul McGhee
<a href="#">63-63</a>	Oct 4	BALLOTS. ELECTIONS. VOTERS.	Ballots marked in the proper square with a cross or X mark or a check or V mark are valid.
<a href="#">64-63</a>	Feb 5	BONDS. COUNTY COLLECTORS.	The bond of the county collector of second class counties shall be fixed as provided in Subsection 1 of Section 52.020, RSMo 1959, within the limits provided in Section 52.380.
<a href="#">65-63</a>	Apr 4	COUNTY HOSPITALS. APPROPRIATIONS, CANNOT BE REPAID.	\$15,068.04 general revenue funds of Ray County for 1956 paid for construction of sewer line of Ray County Memorial Hospital by county court order, not a loan, but an appropriation made for improvement and maintenance of public hospital within meaning of Section 205.230, RSMo 1959. Hospital is unauthorized to repay appropriation to Ray County.
<a href="#">66-63</a>	Apr 8	COUNTIES. COLLECTORS. TOWNSHIP ORGANIZATIONS. FEES AND SALARIES. COUNTY OFFICERS.	Section 52.270, RSMo 1959, limits the maximum fees and commissions on current taxes to be retained by collectors and ex-officio collectors and is not in conflict with Section 52.260, RSMo 1959. Section 52.250, RSMo 1959, does not apply to ex-officio collectors.
<a href="#">70-63</a>	May 10		Opinion letter to the Honorable Clarence P. Lehn
72-63	Apr 3		WITHDRAWN
<a href="#">73-63</a>	Feb 15	SCHOOLS. SCHOOL TAXES.	City school districts having population of less than 75,000 inhabitants may increase tax rate unlimited in amount not to exceed four years with approval of two-thirds of voters or may increase tax rate not to

			exceed \$3.00 for one year with approval of majority of the voters.
<a href="#">75-63</a>	Jan 24		Opinion letter to the Honorable Don E. Burrell
<a href="#">78-63</a>	Jan 24	PUBLIC ASSISTANCE. AID TO DEPENDENT CHILDREN.	1) It is not mandatory that the defaulting parent be prosecuted as a condition precedent to the granting of A.D.C. benefits. 2) Support payments or other income should be deducted from the needs of the family as determined by the Division of Welfare and not from the maximum amount payable under Section 208.150.
<a href="#">82-63</a>	Feb 12		Opinion letter to the Honorable Charles B. Faulkner
<a href="#">83-63</a>	May 22		Opinion letter to the Honorable Thomas R. Beveridge
<a href="#">84-63</a>	Mar 29	SCHOOLS. COMPULSORY SCHOOL ATTENDANCE. MINORS.	Neither the parents nor the husband of a married child under sixteen years of age have the charge, control or custody of such married child within the meaning of the compulsory school attendance law of Missouri.
<a href="#">85-63</a>	Feb 5	CONSTITUTIONAL LAW. NON-PARTISAN COURT PLAN. COURTS. MAGISTRATES. PROBATE JUDGES. ELECTIONS. ST. LOUIS COUNTY. CIRCUIT COURTS.	The non-partisan court plan can be extended to St. Louis county and other circuits by statute. Non-partisan court plan can be adopted without including magistrates in such plan. Non-partisan court plan can be adopted without including office of probate judge and ex officio magistrate. Non-partisan court plan can be adopted in St. Louis county without submitting question to voters.
<a href="#">86-63</a>	Feb 6	LOTTERIES. SALES. REFERRAL SELLING.	Plan whereby buyer of merchandise received commission on each purchase by persons to whom he refers salesman is a lottery.
<a href="#">87-63</a>	Feb 4	INSURANCE.	Articles of Incorporation of Old Reliable Insurance Company.
<a href="#">88-63</a>	Mar 11		Opinion letter to the Honorable J. R. Fritz
89-63	Mar 26		WITHDRAWN
<a href="#">90-63</a>	Mar 22	TAXATION. CONSOLIDATION OF MUNICIPALITIES. CITIES, TOWNS AND VILLAGES. REFUND OF TAXES.	After consolidation of two municipalities, the governing body has no authority to make any distinction, with respect to liability for taxes thereafter levied, between residents of the two former municipalities and may not legally forgive the payment or refund taxes so levied to the residents of one of such former municipalities.
<a href="#">92-63</a>	May 27		Opinion letter to the Honorable Charles G. Hyler
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<a href="#">93-63</a>	May 13		Opinion letter to the Honorable Joe R. Ellis
<a href="#">94-63</a>	July 3	CRIMINAL EXTRADITION. WRITTEN WAIVERS OF. HABEAS CORPUS APPLICATIONS. MAGISTRATE COURT MAY TAKE, WHEN.	1. As judge of a court of record, a magistrate may accept; written waiver of criminal extradition, when the accused executes or subscribes waiver in presence of magistrate, as provided by Section 548.260, RSMo 1959. 2. One arrested on governor's rendition warrant, when taken before magistrate, in accordance with Section 548.101, RSMo 1959, informs magistrate of desire to test legality of his arrest; magistrate shall fix reasonable time for application for habeas corpus. Application in first instance shall be made to circuit judge of county where accused is in custody, as provided by Section 532.030, RSMo 1959. If circuit judge is out of county and statement of unavailability of such judge is in application, such application may then be made to a magistrate of same county, who shall determine if habeas corpus shall or shall not be issued.
<a href="#">95-63</a>	Oct 3	INCOME TAX. BANK TAX. NATIONAL BANKS. DIVIDEND CREDIT.	The payment of the seven per cent Missouri Bank Tax by a national bank is not a basis for allowing the dividend credit provided in Section 143.180, RSMo 1959.
<a href="#">96-63</a>	Mar 7		Opinion letter to the Honorable Charles D. Trigg
<a href="#">97-63</a>	Apr 3		Opinion letter to the Honorable William J. Cason
<a href="#">101-63</a>	June 10	COUNTIES. COUNTY COURTS. COUNTY SURVEYORS. SURVEYORS.	County Court required to provide office space and supplies to County Surveyor; however, County Court determines adequacy of office and supplies provided.
<a href="#">103-63</a>	Oct 22	COURTS. JUDGES. RULE OF NECESSITY.	Judge of police court of a fourth class city must hear case arising out of occurrence which he witnessed where no provision made for substitute judge.
<a href="#">104-63</a>	Feb 15	SCHOOLS. SCHOOL DISTRICTS. SPECIAL SCHOOL DISTRICTS. HANDICAPPED CHILDREN. ST. LOUIS COUNTY. INCAPACITATED CHILDREN.	Special school district for handicapped children must provide instructions for every child in school district, either by special school classes or free instruction course. Child may attend classes part-time if superintendent deems child is incapacitated.
109-63	Mar 6		WITHDRAWN
<a href="#">113-63</a>	Feb 28		Opinion letter to the Honorable Stephen H. Zielmann
<a href="#">115-63</a>	Mar 12	COUNTY	An election must be held in Gasconade County on April 2, 1963 for the

		SUPERINTENDENT OF SCHOOLS. BALLOTS. ELECTIONS.	office of County Superintendent of Schools and it is the duty of the County Clerk of Gasconade County to cause sufficient ballots to be printed and delivered to the various school districts of the county; and this ballot should contain a place for write-in votes.
<a href="#">117-63</a>	May 3	BARBERS. BARBER COLLEGES. BARBER SCHOOLS.	Section 328.120, RSMo 1959, requires that there be one instructor directly supervising the practical training of not more than ten students in a barber school or college.
118-63	May 2		WITHDRAWN
<a href="#">122-63</a>	May 29		Mr. Orville C. Winchell
<a href="#">124-63</a>	Mar 8	INSURANCE.	Proceedings of board of directors of Shield Life and Accident Insurance Company, changing from stipulated premium life insurance company to regular life insurance company are in acceptable legal form.
<a href="#">126-63</a>	Mar 21		Opinion letter to the Honorable Tom Baker
<a href="#">127-63</a>	Mar 13		Opinion letter to the Honorable George H. Pace
<a href="#">128-63</a>	June 5		Opinion letter to the Honorable Frank Conley
<a href="#">137-63</a>	July 29	COUNTIES. COLLECTORS. COMPENSATION. STATUTES.	At no time during the term of office of the county collectors within the classification of Subdivision (14), Section 52.260, which collectors took office in March, 1959, for a four year term, were such collectors obliged to deduct from their commissions expenditures for office space, office equipment or supplies.
<a href="#">139-63</a>	Mar 22		Opinion letter to the Honorable Vance R. Frick
<a href="#">140-63</a>	Apr 1		Opinion letter to the Honorable Paul Boone
<a href="#">143-63</a>	Mar 14		Opinion letter to the Honorable Don E. Burrell
<a href="#">152-63</a>	May 3		Opinion letter to the Honorable James A. Dunn
<a href="#">153-63</a>	May 3		Opinion letter to the Honorable Don Owens
<a href="#">156-63</a>	Apr 9		Opinion letter to the Honorable Daniel V. O'Brien
<a href="#">157-63</a>	June 25	RELIGION. SCHOOLS. CONSTITUTIONAL LAW. TEACHING OF RELIGION. STATE COLLEGES.	It is permissible for regular faculty members to teach academic courses about religion as a part of the curriculum of a state supported college.
<a href="#">158-63</a>	Apr 9	BANKS AND BANKING.	The words "another community" found in Sections 362.325 and 363.520 RSMo 1959, relating to change in location of an existing bank or trust company, do not refer to definite boundaries of political

			subdivisions, but refer to a community of people or interests, banking interests or banking facilities, and such fact issue is to be determined by employing procedures outlined in such statutes.
<a href="#">159-63</a>	Apr 11		Opinion letter to the Honorable Floyd L. Sperry, Jr.
<a href="#">162-63</a>	May 10		Opinion letter to the Honorable Jack L. Clay
<a href="#">163-63</a>	July 19	COUNTY DEPOSITARIES.	Section 110.130, RSMo 1959, does not require county depositaries to be located within the county seat.
<a href="#">167-63</a>	Apr 19	COMPATIBILITY OF OFFICES. OFFICERS. CITIES OF FOURTH CLASS ALDERMAN.	In cities of the fourth class one individual cannot serve simultaneously as alderman and as collector.
<a href="#">169-63</a>	June 6	AID TO DEPENDENT CHILDREN BENEFITS. COURT RECORDS. INSPECTION OF PUBLIC RECORDS.	1. Division of Welfare may grant A.D.C. benefits when parent is paroled with provision that he support his children. 2. The records of the St. Louis Court of Criminal Corrections concerning paroles are public records and open to public inspection.
<a href="#">170-63</a>	Apr 19		Opinion letter to the Honorable Charles G. Hyler
<a href="#">171-63</a>	Apr 23	LEGISLATION. CONSTITUTIONAL LAW. MOTOR VEHICLES. TRUCKS.	The emergency clause appended to H.B. No. 83, 72nd General Assembly (which is an act to increase truck weight limits and registration fees), is invalid since said act is not "necessary for the immediate preservation of the public peace, health or safety," as provided in Section 52, Article III, Missouri Constitution.
<a href="#">172-63</a>	May 24	CITIES OF FOURTH CLASS. OFFICERS.	Marshal elected in April, 1963, in Fourth Class City of Grandview, Missouri, may not serve or be paid an additional salary as a patrolman member of the police department of such city. Such offices incompatible due to fact that office of patrolman is subordinate and accountable to office of marshal. Such marshal may not be paid an additional salary as chief of police.
<a href="#">174-63</a>	Apr 18	INSURANCE.	Articles of Incorporation of General Life of Missouri Insurance Company
<a href="#">175-63</a>	Apr 12		Opinion letter to the Honorable Hubert Wheeler
<a href="#">176-63</a>	July 26		Opinion letter to the Honorable R. J. King, Jr.
177-63	Dec 20		WITHDRAWN
<a href="#">178-63</a>	Oct 11		Opinion letter to the Honorable Charles D. Trigg
<a href="#">181-63</a>	June 17	COUNTIES. COUNTY COURTS. PLANNING	County planning commission not authorized to issue building permits. Such permits must be issued by enforcement officer appointed by county court after county court adopts zoning order.

		COMMISSIONS. ZONING COMMISSIONS. PLANNING AND ZONING COMMISSIONS.	
<a href="#">183-63</a>	Apr 29		Opinion letter to the Honorable Peter J. J. Rabbitt
<a href="#">185-63</a>	Nov 27	LIBRARIES. COUNTY LIBRARIES. COUNTY LIBRARY DISTRICTS. STATE AID.	Persons residing on Federal military bases within the boundaries of county library district are residents of such district entitled to library services and are to be counted in determining county library district population for purposes of state aid.
<a href="#">186-63</a>	May 15	LIEUTENANT GOVERNOR. GENERAL ASSEMBLY. STATUTES.	Section 26.020, RSMo 1959, does not prohibit Lieutenant Governor from employing two secretaries.
<a href="#">188-63</a>	July 24	ASSESSORS (CITY AND TOWNSHIP). TOWNSHIP ORGANIZATION. CITY COUNCILMAN. THIRD CLASS CITIES. COUNTIES.	1. The offices of city assessor and city councilman in a third class city are incompatible and one person may not hold both of said offices simultaneously. 2. The offices of city assessor in a third class city and township clerk, ex officio assessor, in a township organizational county of the third class are not incompatible nor is there any statutory or constitutional prohibition against one person holding both offices and therefore one person may hold both offices simultaneously.
<a href="#">191-63</a>	May 23		Opinion letter to the Honorable Charles P. Moll
<a href="#">199-63</a>	June 12		Opinion letter to the Honorable Herman G. Kill
<a href="#">202-63</a>	July 29		Opinion letter to the Honorable R. B. Mackey
<a href="#">203-63</a>	Aug 26		Opinion letter to Mr. Paul C. Martin
<a href="#">205-63</a>	June 14		Opinion letter to the Honorable Milton Carpenter
<a href="#">206-63</a>	May 9		Opinion letter to the Honorable William J. Esely
<a href="#">207-63</a>	June 21	MAGISTRATE COURTS. COUNSEL, APPOINTMENT. MISDEMEANORS. INDIGENTS.	1. Magistrate courts of this state have the power to appoint counsel to represent indigent defendants accused of misdemeanors. 2. Counsel must be appointed in all misdemeanor cases of more than minor significance and in all cases where prejudice might result. 3. No plea of guilty to a misdemeanor charge may be taken in the absence of counsel unless the accused has intelligently waived his right

			to be represented by counsel.
<a href="#">208-63</a>	June 19		Opinion letter to State Tax Commission of Missouri
<a href="#">209-63</a>	May 15		Opinion letter to Mr. Lue C. Lozier
<a href="#">210-63</a>	May 14	CITIES, TOWNS, VILLAGES. SPECIAL CHARTER CITIES. CONSTITUTIONAL LAW. GENERAL ASSEMBLY. LEGISLATURE. CITY CHARTERS. AMENDMENT OF CITY CHARTERS.	Legislature may have authority to provide for amendment for charter of special charter city by vote.
<a href="#">211-63</a>	Sept 5	SALES TAX. MOTOR VEHICLE USE TAX. MOTOR VEHICLES. TRAILERS. HOUSE TRAILERS. MOBILE HOMES.	Sales of mobile homes at retail are sales tax transactions and the seller or mobile home dealer is required to collect and remit the sales tax to the Director of Revenue. If a purchaser wishes to use his trailer on the highways of Missouri, he must register the trailer and obtain a certificate of ownership. When he applies for his title, the purchaser is required to show satisfactory proof of sales tax having been previously paid.
<a href="#">213-63</a>	May 15	CITIES. COUNTIES. MUNICIPALITIES. POLITICAL SUBDIVISIONS. CO-OPERATION BETWEEN POLITICAL SUBDIVISIONS.	Article VI, Sec. 16, Constitution of Missouri, authorizes enactment of a law permitting one municipality to contract with another to furnish police services; but does not authorize enactment of a law permitting a contract for municipal judicial service.
<a href="#">215-63</a>	Aug 21		Opinion letter to the Honorable R. G. Mackey
<a href="#">219-63</a>	May 24		Opinion letter to the Honorable Granvil B. Vaughan
<a href="#">221-63</a>	Dec 3		Opinion letter to the Honorable J. R. Eiser
<a href="#">226-63</a>	June 20	STATUTE OF LIMITATIONS. MISDEMEANOR. CRIMINAL LAW. INDICTMENTS. INFORMATIONS.	1. Under Section 541.210 an information or indictment in a misdemeanor must be filed within one year after the commission of the offense but service of the warrant on the defendant within one year is not required. 2. Under Section 541.220, RSMo 1959, the one year statute of limitations imposed by Section 541.210, RSMo 1959, is tolled during the period that the defendant has left the state or

		WARRANTS.	concealed himself within the state in order to avoid prosecution.
<a href="#">228-63</a>	May 24	INSURANCE.	Articles of Incorporation of The Frontier Life Insurance Company
<a href="#">229-63</a>	May 24	INSURANCE.	Articles of Incorporation of Jefferson Life Insurance Company
<a href="#">233-63</a>	May 28	INSURANCE.	Articles of Incorporation of Vico Insurance Company
<a href="#">234-63</a>	May 28	INSURANCE.	Articles of Incorporation of Mark Twain Life Insurance Company
<a href="#">236-63</a>	Sept 9		Opinion letter to the Honorable Walter J. Meyer
<a href="#">240-63</a>	Sept 3	COUNTY HOSPITALS. COUNTY COURTS. WARRANTS.	The single monthly voucher permitted in Section 205.190(4) to obtain a warrant for payment of county hospital expenses must be properly authenticated and contain information showing that the claims to be paid are for purposes within the control of the hospital board and within the statute, but need not contain further detailed description of the individual claims to be paid.
<a href="#">245-63</a>	June 17		Opinion letter to the Honorable Charles B. Faulkner
<a href="#">247-63</a>	June 24	TAXATION. CITIES, TOWNS, AND VILLAGES.	A village is subject to constitutional limitations and to specific statutory limitations on its power and authority to levy taxes.
<a href="#">249-63</a>	June 11		Opinion letter to the Honorable Wendell D. Rosenbaugh
<a href="#">251-63</a>	Aug 29	DRAINAGE DISTRICTS.	Substantial changes in plan for reclamation must be effected by the procedures set out in Section 242.310, RSMo 1959.
<a href="#">253-63</a>	Aug 15	COUNTY JUDGES. EXPENSE PAYMENTS TO COUNTY JUDGES.	Mileage traveled by county court judges from their homes to a place of assembly to tour the county on a road inspection in one automobile is "necessary" travel on "official business" within the meaning of Section 49.120, and the judges are entitled to the reimbursement therefor.
<a href="#">255-63</a>	June 27		Opinion letter to the Honorable Bill D. Burlison
<a href="#">256-63</a>	Oct 4	RECORDS. PUBLIC RECORDS. DESTRUCTION OF RECORDS.	Definition of public records and procedures for microfilming and destruction.
<a href="#">258-63</a>	Nov 4	MISSOURI STATE HIGHWAY PATROL. MUNICIPALITIES. POLITICAL SUBDIVISIONS. COOPERATION	(1) Section 70.220, RSMo 1959, authorizes a municipality to enter into a contract with another municipal city or political subdivision for common police protection in accordance with the provisions of Sections 70.210 through 70.325.  (2) Section 70.220 requires that a state agency be authorized to enter into such a contract and to date the Highway Patrol has not received



		BETWEEN POLITICAL SUBDIVISIONS.	such authorization from the Legislature.
<a href="#">259-63</a>	June 25		Opinion letter to the Honorable Don W. Owensby
<a href="#">265-63</a>	Sept 17		Opinion letter to the Honorable Charles D. Trigg
266-63	Nov 27		WITHDRAWN
<a href="#">267-63</a>	Oct 17		Opinion letter to the Honorable Robert B. Mackey
<a href="#">269-63</a>	July 8		Opinion letter to the Honorable Carroll J. Donohue
<a href="#">270-63</a>	June 27		Opinion letter to the Honorable A. Basey Vanlandingham
<a href="#">271-63</a>	Aug 23	CORONERS. DEAD BODIES. PERSONAL PROPERTY. MORGUES.	As it relates to the Coroner of Jackson County, Sec. 58.260 spells out the scope of the coroner's authority in violence or casualty cases, excepting homicide and abortion cases. Sec. 58.451 spells out the somewhat broader scope of authority of the Coroner of Jackson County in homicide and abortion cases.  Sec. 58.240 does not apply to the City of Kansas City. Temporary custody of property at the scene or on the body is to be taken by the sheriff or police, except in the limited case in which the coroner calls an inquest, in which event the coroner takes custody only of the property found on the body.
<a href="#">272-63</a>	Sept 5		Opinion letter to the Honorable Lewis B. Hoff
274-63	June 27		WITHDRAWN
<a href="#">275-63</a>	Aug 7	MAGISTRATES. DEPUTIES. COMPENSATION. COUNTIES. COUNTY COURTS.	Where a magistrate whose office is created by order of the circuit court appoints a deputy clerk or other employee and fixes the salary within statutory limits, county court must pay such salary and may not reduce it.
<a href="#">276-63</a>	June 25	SHERIFFS. VACANCIES. ELECTIONS. QUO WARRANTO. REMOVAL FROM OFFICE.	Sheriff removed from office by quo warranto proceedings not eligible to be candidate for election to fill vacancy caused by such ouster.
<a href="#">277-63</a>	Aug 7		Opinion letter to the Honorable Don F. Whitcraft
<a href="#">279-63</a>	Aug 26		Opinion letter to the Honorable Edwin W. Mills
<a href="#">280-63</a>	July 18		Opinion letter to the Honorable Ronald Belt

<a href="#">281-63</a>	Oct 2	LICENSES. EMPLOYMENT AGENCIES.	Baker Employment Agency, Danville, Illinois, is not required to secure a license as such from the State Division of Industrial Inspection.
<a href="#">282-63</a>	July 17	INSURANCE.	Articles of Incorporation of Family Security Life Insurance Company.
<a href="#">283-63</a>	Sept 10	COUNTY COLLECTOR. TRAVEL EXPENSES. MILEAGE.	Collector of county of second class may receive reimbursement from county court for reasonable travel expenses actually and necessarily incurred in carrying out the official duties imposed by Sections 139.080 and 150.110, RSMo 1959.
<a href="#">284-63</a>	Oct 14	SCHOOLS. SCHOOL DISTRICTS. QUORUM. SCHOOL BOARDS. VACANCIES.	1. When a vacancy occurs on the board of a six-director school board, a quorum of at least four members is necessary to fill the vacancy. 2. When two members of the board absented themselves for the purpose of preventing a quorum during the course of the meeting, the vacancy was legally filled by three members who remained.
<a href="#">285-63</a>	Aug 26		Opinion letter to the Honorable Marvin L. Dinger
<a href="#">286-63</a>	July 10		Opinion letter to the Honorable James E. Godfrey
<a href="#">293-63</a>	Oct 1	DIVISION OF INDUSTRIAL INSPECTION. EMPLOYMENT AGENCIES. LICENSES.	Grant Cooper and Associates is operating or conducting an employment agency and is required to be licensed by the Division of Industrial Inspections.
<a href="#">295-63</a>	Aug 16	TAXATION. AIRLINE COMPANIES. COUNTY COLLECTOR. CITY COLLECTOR. CONSTITUTIONAL CHARTER CITIES.	Taxes levied by constitutional charter cities on locally assessed real and personal property of airline companies are to be entered in the city tax books and collected by the city collectors.
<a href="#">296-63</a>	Oct 17	SAFETY RESPONSIBILITY. MOTOR VEHICLE SAFETY RESPONSIBILITY.	A judgment-creditor need not proceed against the surety bond, given by the judgment-debtor as proof of financial responsibility before the Director can suspend the license and registration of said judgment is deemed satisfied when the amounts and conditions of payment have been met in Section 303.120, RSMo 1959.
<a href="#">298-63</a>	Sept 9		Opinion letter to the Honorable Walter L. Meyer
<a href="#">301-63</a>	Dec 18		Opinion letter to E. V. Nash
<a href="#">303-63</a>	Sept 4	COUNTIES. COUNTY COLLECTORS. STATUTES.	Senate Bill No. 259, 72nd General Assembly becomes effective Oct. 13, 1963. It does not violate Sec. 13, Art. VII, Constitution of Mo., 1945, as to collectors in 1st and 2nd class counties or counties under charter. Collectors in 3rd or 4th class counties which fall into the classification

		COMPENSATION. CONSTITUTIONAL LAW.	of Subdivision (15) of the bill are, during their current term of office, limited to the compensation authorized by Section 52.270, RSMo 1959.
<a href="#">306-63</a>	Aug 12	COUNTIES. OFFICERS. COUNTY COURTS. COUNTY HEALTH OFFICER. COUNTY HEALTH CENTER.	In those counties which have a county health center, the county court should appoint the director of the public health center as the county health officer.
<a href="#">307-63</a>	July 24		Opinion letter to the Honorable Michael Kinney
<a href="#">313-63</a>	Nov 1		Opinion letter to the Honorable Harry Keller
<a href="#">315-63</a>	Aug 16		Opinion letter to the Honorable Larry M. Woods
<a href="#">317-63</a>	Aug 12		Opinion letter to the Board of Public Buildings
<a href="#">318-63</a>	Dec 24	DIVISION OF COMMERCE & INDUSTRIAL DEVELOPMENT. INDUSTRIAL DEVELOPMENT. MUNICIPAL CORPORATION.	The cities of Clarksville, Bowling Green and Louisiana may cooperate with each other on industrial development projects.
<a href="#">319-63</a>	Aug 15	COUNTIES. ORDINANCES. ST. LOUIS COUNTY COUNCIL.	Any ordinance defined as an emergency ordinance under Section 18 of the St. Louis County Charter can only be validly enacted by five (5) affirmative votes of the County Council.
<a href="#">321-63</a>	Sept 9	TAXATION. FRANCHISE TAX REPORTS. SECRECY OF TAX RETURNS. STATE TAX COMMISSION. INSPECTION OF TAX RETURNS.	Section 147.110, paragraph 3, RSMo 1959, which prohibits the state tax commission, its officers and employees and all other officers and employees of the state from divulging or making known the information contained in a franchise tax report does not prohibit the commission from permitting the taxpayer, acting through a duly authorized officer or agent from inspecting or obtaining a copy of its own report theretofore filed.
<a href="#">322-63</a>	Aug 5		Opinion letter to the Honorable Thomas A. Walsh
<a href="#">327-63</a>	Oct 9		Opinion letter to the Honorable Smith N. Crowe
<a href="#">328-63</a>	Oct 29		Opinion letter to the Honorable Haskel Holman

<a href="#">330-63</a>	Sept 17		Opinion letter to the Honorable Gerald Kiser
<a href="#">333-63</a>	Jan 22		Opinion letter to the Honorable Milton Carpenter, Honorable Charles Trigg, and Honorable Thomas C. Dunne
<a href="#">335-63</a>	Aug 13	EFFECTIVE DATE OF LAWS. LAWS – EFFECTIVE DATE. SUNDAY CLOSING. BLUE LAW. NUISANCE. STATUTES. CRIMINAL LAW.	(1) Effective date of new Sunday Closing law is Oct. 13, 1963 and there exists no reason why it should not be enforced as of that date. (2) In addition to criminal sanctions imposed by the law, a prosecuting attorney has the authority to seek a civil injunction to enjoin illegal Sunday selling as a public and common nuisance. (3) A private party may sue to abate such nuisance if he has suffered some peculiar or special injury not common to the general public.
<a href="#">336-63</a>	Aug 20	INSURANCE.	Articles of Incorporation of Progressive Security Life Insurance Company.
<a href="#">338-63</a>	Sept 16	COUNTY COLLECTOR. COUNTY OF THIRD CLASS. COMMISSIONS.	1) A collector of a county of the third class with a population of over 40,000 is not required by Section 52.120, RSMo 1959, to maintain a branch office. 2) The additional compensation for maintaining such branch office as provided by Section 52.140, RSMo 1959, does not apply to counties of the third class with a population of over 40,000.
<a href="#">339-63</a>	Sept 30	BARBERS. BOARD OF BARBER EXAMINERS. ADMINISTRATIVE AGENCIES.	Board of Barber Examiners should permit applicants for registration who do not read or write English to use interpreters during written examination. Board may impose reasonable requirements so as to preserve the integrity of examination.
<a href="#">341-63</a>	Nov 1	CORPORATE EXISTENCE. FARMERS MUTUAL INSURANCE COMPANY. MUTUAL INSURANCE COMPANY. INSURANCE. REVIVAL OF CHARTERS.	Farmers Mutual Insurance Company may not receive its corporate existence after expiration of charter by limitation.
<a href="#">342-63</a>	Sept 4		Opinion letter to Representative Kenneth J. Rothman
<a href="#">343-63</a>	Sept 20		Opinion letter to the Honorable Lewis B. Hoff
<a href="#">344-63</a>	Sept 19		Opinion letter to the Honorable Joseph T. Conlon, Jr.
<a href="#">349-63</a>	Oct 31		Opinion letter to the Honorable Bill D. Burlison

<a href="#">351-63</a>	Sept 4		Opinion letter to the Honorable John D. Mitchell
<a href="#">352-63</a>	Dec 10		Opinion letter to the Honorable Don F. Whitcraft
<a href="#">353-63</a>	Sept 4		Opinion letter to the Honorable Charles G. Hyler
<a href="#">354-63</a>	Oct 10		Opinion letter to the Honorable Stewart E. Tatum
<a href="#">365-63</a>	Sept 9		Opinion letter to the Honorable Frank L. Mickelson
<a href="#">368-63</a>	Sept 17	COMMITTEEMEN. WARDS. COUNTY COURT. CITIES, TOWNS AND VILLAGES. CITIES OF THIRD CLASS. PRECINCT. BOARD OF ELECTION COMMISSIONERS. ELECTIONS.	1) The provisions of Section 120.770, RSMo 1959, refer to any city divided into wards if the county court sees fit to divide the township into election districts coincident with the ward boundaries. A village is not a city under the Missouri statutes, therefore the above opinion does not apply to wards of a village. 2) Precincts in third class cities with city manager form of government are deemed wards under 78.540 (6), RSMo 1959, hence the above opinion applies to such precincts. 3) The Board of Election Commissioners of Kansas City, not the County Court of Clay County, is authorized to divide that part of Kansas City in Clay County into wards under Section 117.190, RSMo 1959, in conjunction with Section 117.050, RSMo 1959.
<a href="#">370-63</a>	Nov 7		Opinion letter to the Honorable Frank Conley
<a href="#">371-63</a>	Oct 11		Opinion letter to the Honorable Edwin W. Mills
<a href="#">374-63</a>	Oct 11	RECORDERS. COUNTIES. RECORDS. DEEDS.	1. Mailing address of grantee or one of the grantees must be placed upon all deeds except deeds of trust or of easement or of right-of-way conveying any lands or tenements. 2. Recorder of deeds shall not record any such instrument unless said required mailing address appears clearly thereon. 3. Provisions of Sec. 442.390 & 442.400, RSMo 1959, are not affected by omission of said required names upon said deeds.
375-63	Sept 30		WITHDRAWN
<a href="#">376-63</a>	Sept 19		Opinion letter to the Honorable Orville C. Winchell
<a href="#">377-63</a>	Sept 16	INSURANCE.	Articles of Incorporation of Tower National Life Insurance Company
<a href="#">381-63</a>	Sept 30		Opinion letter to the Honorable Milton Litvak
382-63	Oct 25		WITHDRAWN
383-63	Sept 23		WITHDRAWN
384-63	Sept 30		WITHDRAWN
<a href="#">385-63</a>	Oct 10	BONDS. SHERIFF. FEES.	The sheriff of a third class county may not legally accept and retain a fee for the taking of a bail bond in a criminal case.

		COUNTIES.	
<a href="#">386-63</a>	Dec 4	AGRICULTURE. FEEDS.	Salt distributed to feed dealers which is either mixed in commercial foods or sold directly to farmers for feeding to animals is not a commercial feed under the Missouri Commercial Feed Law of 1959.
<a href="#">390-63</a>	Sept 30		Opinion letter to the Honorable Maurice Schechter
<a href="#">392-63</a>	Oct 10		Opinion letter to the Honorable Jack K. Smith
<a href="#">393-63</a>	Sept 30		Opinion letter to Mr. J. T. Johnson
<a href="#">395-63</a>	Nov 7		Opinion letter to the Honorable William H. Bruce, Jr.
<a href="#">396-63</a>	Nov 25		Opinion letter to the Honorable James T. Riley
<a href="#">397-63</a>	Oct 21	SPECIAL ROAD DISTRICTS. TAX ANTICIPATION NOTES. WARRANTS.	Special road districts may not issue tax anticipation notes, but may issue warrants up to the amount of revenue anticipated for the year in which the warrants are issued.
<a href="#">398-63</a>	Oct 4		Opinion letter to the Honorable James A. Noland, Jr.
<a href="#">400-63</a>	Dec 5	COUNTY COLLECTOR. ST. LOUIS COUNTY.	Collector of St. Louis County does not have the power to invest County funds in his possession.
<a href="#">402-63</a>	Oct 4		Opinion letter to the Honorable Herman G. Kidd
<a href="#">404-63</a>	Oct 14		Opinion letter to the Honorable Thomas G. Woolsey
<a href="#">405-63</a>	Oct 14		Opinion letter to the Honorable Edgar J. Keating
406-63	Nov 4		WITHDRAWN
<a href="#">407-63</a>	Oct 11	INSURANCE.	Articles of Incorporation of Modern American Life Insurance Company.
411-63	Nov 7		WITHDRAWN
<a href="#">412-63</a>	Oct 16		Opinion letter to the Honorable Bill Crigler
<a href="#">414-63</a>	Dec 13	APPROPRIATIONS. HOUSE AND SENATE COMMITTEES. JOINT COMMITTEES.	Expenses incurred by the Joint Committee on Correctional Institutions and Problems should be paid from the appropriation made under Section 8.020 in House Committee Substitute for House Bill No. 8 and cannot be paid from Section 8.010 of said bill.
<a href="#">415-63</a>	Dec 24	SCHOOLS. SCHOOL DISTRICTS. COUNTY. BOARD OF EDUCATION.	No person can be candidate for election to a county board of education created by Senate Bill No. 327 of the 72nd General Assembly unless the person is a resident householder of the county in which the county board of education is created.
<a href="#">416-63</a>	Oct 17		Opinion letter to the Honorable Paul Knudsen

<a href="#">417-63</a>	Oct 18		Opinion letter to the Honorable James T. Riley
<a href="#">421-63</a>	Oct 31		Opinion letter to the Honorable Edward W. Speiser
<a href="#">433-63</a>	Dec 4	FOURTH CLASS CITIES. COMPENSATION. ZONING COMMISSION. CITY PLANNING COMMISSION.	A Fourth Class City may legally continue to pay compensation to members of an existing zoning commission which was in existence before the effective date of House Bill 317, 72nd General Assembly, after the effective date of such bill.
<a href="#">435-63</a>	Nov 1		Opinion letter to the Honorable Charles P. Moll
<a href="#">437-63</a>	Nov 7		Opinion letter to the Honorable Don F. Whitcraft
<a href="#">438-63</a>	Nov 14		Opinion letter to the Honorable Loyd J. Estep
<a href="#">451-63</a>	Nov 13	ASSESSMENT OF PROPERTY. ASSESSORS. COUNTY COURT. TAXATION.	The county court of any county is authorized to employ experts to replat and prepare maps, to locate and evaluate real estate in said county for purpose of aiding the county assessor in securing a full and accurate assessment of all taxable property in the county without submitting the question to the voters.
<a href="#">452-63</a>	Nov 19		Opinion letter to the Honorable Ralph B. Nevins
<a href="#">454-63</a>	Nov 18		Opinion letter to the Honorable E. J. Cantrell
<a href="#">456-63</a>	Nov 27	STATE DIVISION OF COMMERCE AND INDUSTRIAL DEVELOPMENT. RESOURCES AND DEVELOPMENT.	Division of Commerce and Industrial Development has authority to provide planning assistance and to contract for and receive federal grants or financial assistance for counties, municipalities and metropolitan areas for planning purposes.
457-63	Nov 18		WITHDRAWN
459-63	Dec 19		WITHDRAWN
<a href="#">464-63</a>	Dec 6		Opinion letter to the Honorable Ralph B. Nevins
465-63	Dec 10		WITHDRAWN
<a href="#">470-63</a>	Dec 18		Opinion letter to Dr. George A. Ulett
<a href="#">475-63</a>	Dec 12		Opinion letter to Mr. Maurice Schechter
<a href="#">491-63</a>	Dec 30		Opinion letter to Mr. Wayne Freeman

PUBLIC RECORDS:  
KANSAS CITY POLICE DEPARTMENT:  
RIGHT OF INSPECTION:

No right of inspection of police records of the Kansas City Police Department exist either under Sec. 109.180, RSMo 1959, or a common law except for those records expressly required by law to be kept.

OPINION NO. 2

March 5, 1963

Honorable W. H. Bates  
Secretary  
Board of Police Commissioners  
Kansas City 6, Missouri



Dear Sir:

We have your request for an opinion of this office wherein you inquire whether Section 109.180, RSMo, 1961 Cum. Supp., requires that certain documents and reports used and kept by the Kansas City Police Department must be opened to public inspection. The relevant portion of that section is as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen."

A misdemeanor penalty is provided for any official who fails to observe the quoted provision, and Section 109.190, RSMo, 1961 Cum. Supp., guarantees the right to photograph or otherwise copy any records included under Section 109.180.

We have examined the detailed lists of the hundreds of reports and records kept by the Kansas City Police Department which you have submitted. They may be divided, roughly, into operational records and administrative records. A great variety of material is contained in each subgroup. Operational records include the basic offense, arrest and investigation reports; the reports of specialized departments dealing with such matters as homicide, vice, narcotics, arson and bombing, burglary and theft, sex offenses, traffic and safety, etc.; alias files; informers' reports; lists of known offenders; and many other too numerous to mention. Generally speaking,



Honorable W. H. Bates

it may be said that these records deal with the basic police functions - the prevention of crime and the apprehension of offenders.

The administrative records, on the other hand, relate principally to the organization and administration of the Police Department. They are concerned primarily with internal matters such as assignments, financial affairs, research, inventories, correspondence, training, etc.

The nature of these records is relevant in the light of the statutory language which permits inspection of records (unless such inspection is elsewhere prohibited) "kept pursuant to statute or ordinance." Sections 84.350 - 84.890, RSMo 1959, setting out the organization and powers of the Kansas City Police Department, do require that certain records be kept. They are as follows:

- § 84.420.2(1) - Rules and regulations concerning the conduct of the Department.
- § 84.500(1) - Reports from the chief of police to the Board concerning the promotion, disciplining, discharge or suspension for more than fifteen days of police officers and other employees.
- § 84.500(2) - An annual report from the chief of police to the Board on the administrative and law enforcement activities of the Department with statistics of all police work.
- § 84.500(3) - An annual report from the chief of police to the Board on financial requirements for the coming year.
- § 84.730 - An annual budget estimate must be prepared by the Board.
- § 84.740 - A final budget must be prepared and adopted annually by the Board.
- § 84.750 - Vouchers, authorizing expenditures, are provided for.

Honorable W. H. Bates

§ 84.790 - A journal of the proceedings of the Board must be kept as well as journals and books of account showing receipts and disbursements of money. Such records must always be available for inspection by the General Assembly. An annual report must be made to the Kansas City City Council setting out the number and expenses of the police force and such other matters as may be of public interest.

§ 84.840 - An annual audit of the Department's accounts must be made and published.

It is our view that the right of public inspection provided by Section 109.180 extends only to the above-listed records required to be kept by statute. Nowhere does it appear that the various operational reports which you list are kept pursuant to statute and very few of the administrative reports are so kept. This fact was noted by the Court of Appeals in *White v. Hasburgh*, Mo. App., 124 SW2d 560, where the defendant in a civil damage suit sought to introduce into evidence a police report prepared by a Kansas City police officer who investigated the automobile accident out of which the suit arose. The Court pointed out (l.c. 565): "There is no statute, or even an ordinance, providing for such reports."

Your letter directs our attention to Section 84.500, previously mentioned, which requires the preparation of an annual report, including statistics on all police work, and you state that it is necessary in order to provide the data for this report for the various units within the Department to maintain records and reports showing all of their administrative and law enforcement activities. While it may be that the preparation of the annual report is facilitated by the maintenance of these reports, it does not follow that such reports are "kept pursuant to statute."

Section 84.500(2) requires only a summary account of police activities and administration throughout the year and it would seem that this could be gathered simply from a running statistical record of numbers and types of offenses, arrests, etc., as well from information gained from individual investigative reports. Similarly, administrative data is required only in terms of totals, rather than specific transactions. Thus the statute is satisfied by a statement of the total number of offenses

Honorable W. H. Bates

reported during the year or a statement of the total payroll, rather than a detailed account of the circumstances of each arrest or a list of the amount paid each person employed by the Department. Necessarily, a large discretion is vested in the chief of police in the manner in which he prepares the annual report and it can hardly be said the sources of the data used in compiling summaries for the report become public records by virtue of that fact. The same reasoning applies to the records used in preparing the budget estimate and final budget required by Sections 84.730 and 84.740.

An annual report is also required of the Superintendent of the State Highway Patrol by Section 43.120(5), RSMo 1959, providing that he "... shall make to the governor and the commission a report of the activities of the patrol and the cost thereof for the fiscal year." Yet, in *Ensminger v. Stout*, Mo. App., 287 SW2d 400, where it was sought to introduce into evidence the investigative report of a highway patrolman, the Court said (l.c. 407): "It [the report] was not required by any statute to be made or filed."

For these reasons, it is our conclusion that the only records to which the right of inspection contained in Section 109.180 applies are those expressly required to be kept by law as listed above.

However, the right to inspection of public records is one which existed under the common law of the state even before the enactment of Section 109.180. In *Disabled Police Veterans Club v. Long*, Mo. App., 279 SW2d 220, 223, the Court said:

"Generally, any writing or document constituting a public record is subject to inspection by the public. \* \* \* \*"

Moreover, the concept of a public record at common law is broader than the standard of "kept pursuant to statute or ordinance" contained in Section 109.180. In *Disabled Police Veterans Club v. Long*, supra, the Court stated (l.c. 223):

"Independently of statute the term public records covers not only papers expressly required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office. International

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Union, etc. v. Gooding, 251 Wis. 362,  
29 N.W.2d 730, 735; Conover v. Board of  
Education, etc., 1 Utah 2d 375, 267 P.  
2d 768, 770; People v. Shaw, 17 Cal. 2d  
778, 112 P. 2d 241, 259."

We are of the view that the authors of Section 109.180 did not propose to restrict the right of inspection granted at common law but rather intended only to express that right in statutory form and provide penalties for those who would deny it. Section 109.180 is a remedial statute and should be given a liberal construction with a view towards attaining the end sought to be achieved. *City of St. Louis v. Carpenter, Mo.*, 341 SW2d 786. This is especially the case with statutes conferring the right to inspect or use public records, which should be liberally construed in favor of inspection. In *re Mosher (C.C.P.A. 1957)*, 248 F.2d 956.

The question remains, then, whether there is a right of inspection at common law of the records in question in the light of the broader common-law conception of a public record as something more than one kept pursuant to statute.

Of course, if a right of inspection is claimed under the common law, the right is subject to all of the exceptions and qualifications contained in the common law. In *Disabled Police Veterans Club v. Long*, supra, the court recognized the existence of these qualifications, although not spelling them out, saying (1.c. 223):

"This right to inspect and to copy public records is not an unlimited right. It is subject to such reasonable regulations as may be imposed to prevent undue interference with the proper functioning of the public officials involved. *State ex rel. Eggers v. Brown*, supra.

"Furthermore, public policy demands that some public records must be kept secret and free from common inspection. In certain situations public records may, in the public interest, be withheld from public inspection. It is unnecessary to consider further this common-law exception to the right to inspect public records because the

Honorable W. H. Bates

respondents have made no serious claim to come under any common-law limitation and we are unable to discover any. They are in no position to insist that any public interest will be served by keeping the requested information secret. International Union, etc. v. Gooding, 251 Wis. 362, 29 N.W.2d 730, 736."

The case there cited, International Union v. Gooding, states as follows (1.c. 29 N.W.2d 736):

"We shall not go into the scope of the common-law right exhaustively or attempt to document our observations upon it. It is enough to say that there are numerous limitations under the common law upon the right of the public to examine papers that are in the hands of an officer as such officer. Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical. The list could be expanded but the foregoing is enough to illustrate that in certain situations a paper may in the public interest be withheld from public inspection. \* \* \*"

More specifically, in Whittle v. Munshower, Md., 155 A.2d 670, 672, the court said:

" \* \* \* But we are aware of no statutory provision that declares that reports made by state police to their superior officer, or information gathered by them in the course of their investigations of reported crimes, should be public records, or open to inspection. In the absence of statutory requirement, it is generally held that police records are confidential. See 45 Am. Jur., Records and Recording Laws, §26, p. 433. \* \* \*"

And, finally, the general rule as to the confidentiality of police records of common law was explicitly stated in Lee v. Beach Publishing Co., 127 Fla. 600, 173 So. 440, 442, as follows:



Honorable W. H. Bates

"The appellant contends that there are certain records in the police department of a city which must be kept secret and free from common inspection as a matter of public policy. This is true. The rule as stated in 23 R.C.L. 161, is as follows:

'The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example as diplomatic correspondence and letters and despatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals.'

On the basis of the foregoing authorities, it is our conclusion that there is no right at common law which permits the public inspection of police records having to do with the investigation of crime and the apprehension of offenders and related police functions. Public policy requires that such matters be kept confidential.

With regard to the various administrative reports of which you inquire, it does not appear that they may properly be styled as "memorials of official actions" but relate principally to the internal organization and functioning of the Department. Mainly they are in the nature of interdepartmental memoranda and personnel and equipment reports. It is our conclusion, therefore, that the common-law right of inspection does not apply to these matters.

#### CONCLUSION

It is the opinion of this office that the right of inspection of records of the Kansas City Police Department provided under Section 109.180, RSMo 1959, extends only to those records expressly required by law to be kept. The right of inspection at common law, though broader than that provided by Section 109.180, contains an exception as to police records and, therefore, is also inapplicable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JURORS:  
JURIES:  
CRIMINAL COSTS:  
JURY FEES:  
TAXATION OF JURORS' FEES:

The State is not liable for any jury fees except such as are taxable as costs pursuant to express statutory authorization. Jurors on the regular panel receive \$6 per day and mileage; jurors not on the regular panel who serve in a case also receive \$6 per day and mileage; and jurors who are summoned in cases described in Sec. 494.120, but do not serve in the trial also receive \$6 per day, and also receive mileage if they have traveled at least one mile. No part of such compensation may be taxed as costs. Jurors not on the regular panel who are summoned in all cases other than those described in Sec. 494.120, but do not serve in the trial receive \$3 per day, and the fees allowed to such jurors are to be taxed as costs in the cases in which they were summoned.

January 4, 1963

Opinion No. 137 *Re. 5 (1963)*

*Names copied  
see index*

Honorable Norman H. Anderson  
Prosecuting Attorney  
St. Louis County  
Courthouse  
Clayton 5, Missouri



Dear Mr. Anderson:

You have requested the opinion of this office concerning the liability of the state under Section 550.020 RSMo 1959, with respect to the compensation paid to jurors who serve in criminal cases. Your letter informs us that heretofore St. Louis County has not taxed jury costs in fee bills which are paid by the state and you suggest that under Section 550.280, RSMo 1959, all such jury costs in criminal cases should be taxed as part of the costs in each case.

Section 550.010 RSMo 1959 provides in part that when any person shall be convicted of any crime or misdemeanor, he shall be adjudged to pay "the costs." Section 550.020, referred to in your letter, to the extent here relevant, requires the state to pay "the costs," if the defendant is unable to pay them, in all capital cases and in cases in which the defendant is sentenced to imprisonment in the penitentiary.

Section 550.040 RSMo 1959 provides in part that in all capital cases and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted "the costs" shall be paid by the state. In other cases the costs are to be paid by the county. These statutes in substantially the same form have been in effect for over a century.

Essentially, the problem involved is whether the clerk of the circuit court of St. Louis county is authorized to

Honorable Norman H. Anderson

tax, either in whole or in part, as part of "the costs" in a criminal case the compensation which is paid or payable to jurors who serve or who are called for service in connection with such case. This for the reason that the state could not be liable under any circumstances unless and to the extent such jury fees are properly taxable as costs. It is to be noted also that in those cases in which the defendant is convicted, neither the state nor the county is liable for the costs unless the defendant is unable to pay them. Hence, the answer to the question presented by your request directly affects the liability of a convicted defendant as well as that of the state or county. That is to say, if the state is liable for such jury fees, either in the event of a conviction or in the event of an acquittal, then under the same circumstances and situation the defendant himself, if convicted, would be primarily liable for the payment of such jury fees. We point this out because the controversy is not simply between the county and the state but involves the rights and liabilities of convicted defendants as well.

In City of Carterville v. Cardwell, 152 Mo.App. 32, 132 SW 745, 746, it was said (citing City of St. Louis v. Meintz, 107 Mo. 1. c. 615, 18 SW 30):

"The word 'costs' when used in relation to the expenses of legal proceedings means the sum prescribed by law as charges for the services enumerated in the fee bill."

The Court further held in that case:

"Costs in criminal proceedings are those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense as compensation to the officers for their services."

The rule is that "all statutes in reference to costs must be strictly construed. Shed v. Railroad, 67 Mo. 687." In re Murphy, 22 Mo.App. 476, 478. In Cramer v. Smith, 350 Mo. 736, 168 SW2d 1039, 1040, the Supreme Court en banc quoted from 20 C.J.S. Costs §435, p. 677, as follows:



Honorable Norman H. Anderson

"'At common law costs as such in a criminal case were unknown. As a consequence it is the rule in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions--that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed.'"

Our Supreme Court has ruled on several occasions that "no costs can be taxed except such as the law in terms allows." State ex rel. Clarke v. Wilder, 197 Mo. 27, 32, 94 SW 499.

We take note of the fact that every person charged with a criminal offense has a constitutional right to a trial by jury. On the face of matters, it seems strange that a person convicted of a misdemeanor should be further punished simply for demanding that to which he is entitled as of right--a trial by jury. Moreover, an accused charged with a felony is given no choice at all. Unless he pleads guilty, he is not only entitled to, but rather, is forced to accept a trial by jury whether he wishes one or not unless the court agrees to a waiver of a jury trial. Section 546.040 RSMo 1959.

It is true that many years ago our Supreme Court held that the General Assembly had the constitutional power to require a jury fee to be taxed as part of the cost against a convicted defendant. State v. Wright, 13 Mo. 243. We express no opinion as to whether the holding in that case is still the law. By coincidence, the statute which was sustained in the Wright case applied solely to St. Louis County. The statutory language in the Act of January 29, 1847, Sec. 3 (Laws 1847, p. 69) requiring the taxation of a jury fee was explicit and unambiguous:

"Also when any judgment shall be rendered in the St. Louis criminal court against any defendant, there shall be taxed with the costs of said judgment, and collected from the defendant as other costs, the sum of three dollars as a jury fee."  
(Emphasis supplied.)

In view of the foregoing considerations, the rule of strict construction, applicable to criminal costs generally,

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should be religiously followed in determining the liability of a convicted defendant for jury costs. If such a defendant is not liable, then it would follow that the state would not be liable for such costs. We therefore rule your question upon the basic premise that criminal jury costs and fees cannot be held taxable in the absence of an express, clear and unambiguous statutory directive.

Section 550.280 RSMo 1959, to which you refer, reads as follows:

"All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."  
(Emphasis supplied.)

The decisive questions are (1) whether prior to the enactment of Section 550.280 fees due jurors who served or were summoned in connection with a criminal case were taxable as part of the costs and (2) whether said section makes any change as to the taxation of such costs.

We first consider the state of the law respecting jury fees at and prior to the time of the enactment of Section 550.280 (Laws 1899, p. 219) and the changes therein as reflected in the Revised Statutes of 1959.

Section 3778 RSMo 1899 provided as follows:

"Each grand and petit juror on the regular panel shall receive two dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the court-house and returning to the same, to be paid out of the county treasury." (Emphasis supplied.)

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Except for the amount of the remuneration paid to jurors on the regular panel, which is now six dollars per day and seven cents per mile, the language of the 1899 statute is identical to that of Section 494.100 RSMo 1959.

Section 3787 RSMo 1899 provided as follows:

"All petit jurors not included in the regular panel shall receive for their services as such jurors one dollar per day, which shall be taxed as costs in the case, but such jurors serving in more than one case in the same day, at the same place, shall only be allowed fees for one day, and in all cases where such juror shall be detained more than one day in the same case, he shall be allowed the sum of one dollar for each additional day he may be detained."  
(Emphasis supplied.)

This section has been changed (aside from the increase in the amount of fees payable) by eliminating that portion relating to taxing such fees as costs. (Laws 1919, p. 433) In its present form, it is Section 494.110 and reads as follows:

"All petit jurors not included in the regular panel shall receive for their services as jurors the amount provided in section 494.100 which shall be paid as provided in that section, but jurors serving in more than one case in the same day at the same place, shall be allowed fees for one day only, and in all cases where the juror shall be detained more than one day, in the same case he shall be allowed the same sum for each additional day he may be detained." (Emphasis supplied.)

Section 3784, RSMo 1899, reads as follows:

"Each juror not on the regular panel and summoned to sit as a juror in any criminal cause wherein the offense charged is punishable with death, or

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by imprisonment in the penitentiary for life, or for not less than a specified number of years and no limit to the time, shall be allowed the sum of one dollar per day for each day that he may be in attendance on said court, and five cents per mile for each mile traveled in going to and returning from said court, whether he sits in the trial of the cause or is challenged off."

In its present form the foregoing section is now Section 494.120. It provides for a fee of six dollars per day (and mileage in some instances) for "each juror not on the regular panel and summoned to sit as a juror" in certain designated criminal cases. The 1899 version of Section 494.120 was construed in 1906 in State ex rel Suter v. Wilder, 196 Mo. 418, 434, 95 SW 396, to mean that only those jurors not on the regular panel who qualified upon panel of forty from which the trial panel of twelve was selected were entitled to have their fees taxed as costs. We note that in the following year, evidently as a result of the Suter decision, the statute was amended to include those who had not been selected on the panel, provided they traveled at least one mile. (Laws 1907, p. 321)

The only other section which related to fees of jurors was Section 3258 RSMo 1899, which provided in part as follows:

"Jurors shall be allowed fees for their services as follows: \* \* \*

"For each juror attending a trial before any court of record, per day, except as otherwise provided by law. . . . 1.00

"For each mile traveled in going to and returning from the place of trial in attending any trial before any court of record, per mile . . . . . .05

"All fees allowed jurors as above shall be taxed as costs in the cases respectively in which they may serve; but jurors serving in more than one case on the same day, at

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the same place, shall only be allowed fees in one case; and any juror who shall claim fees for attending in two or more cases on the same day at the same place shall not be allowed fees for that day." (Emphasis supplied.)

In its present form, the statute is Section 494.170 RSMo 1959. That section reads in part as follows:

"1. Except as otherwise provided by law jurors shall be allowed fees for their services as follows: \* \* \*

For each person summoned, attending and reporting to any court of record, per day. . . . . 3.00

For each mile traveled in going to and returning from the place of the trial in attending any trial before a court of record, per mile. . . . .07

"2. All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but jurors serving in more than one case on the same day, at the same place, shall be allowed fees only in one case; and any juror, who claims fees for attending in two or more cases on the same day, at the same place, shall not be allowed fees for that day." (Emphasis supplied.)

This section by its terms applies only where no other provision for compensation is made. In our opinion, it applies to all jurors not on the regular panel who are summoned in a specific case and attend court, but who do not serve on the trial panel, except those jurors who come within the provisions of Section 494.120.

The statutes above quoted make a clear distinction between jurors on the regular panel and those who are not so included. This distinction formerly had an important bearing upon the amount payable to the juror, although in recent years the



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Legislature has granted the same compensation to all jurors except those who come within the scope of Section 494.170. Thus, in 1899, jurors on the regular panel received two dollars a day payable out of the county treasury, while those not included on the regular panel were allowed only one dollar a day, if they served in the trial under Section 3787 or were on the qualified panel under Section 3784. All fees allowed to those not on the regular panel were specifically directed to be taxed as costs. Our present statutes since 1919 have eliminated the provision specifically requiring the taxation of jury fees of those not on the regular panel as part of the costs, except only as to those jurors who come within the scope of Section 494.170 RSMo 1959.

A brief reference to some of the earlier statutes relating to the selection and payment of jurors is of help in understanding the state of the law in 1899. Chapter 88 of RSMo 1855 contained two articles relating to jurors. Article I contained general provisions, and in effect provided for summoning jurors to serve when needed in particular cases. Section 29 of that Article provided that the fees allowed to jurors "serving in a trial of any civil or criminal case" shall be taxed and collected as other costs in the case. Article II authorized standing jurors (regular panel), who were to receive scrip payable out of the county treasury, nothing being said as to taxing the cost of such standing jurors.

Chapter 146 of General Statutes of Missouri 1865, also provided for summoning jurors to serve whenever they were required for the trial of a particular case. Each juror serving in a trial (civil or criminal) was entitled to a specified fee (\$1.00 per diem) which was to be "taxed and collected as other costs in the case" (with the usual proviso that a juror who claims fees for serving in two or more cases on the same day shall not be allowed fees for that day).

Section 29 of said Chapter 146 provided that courts of record exercising criminal jurisdiction had the right to order the sheriff to summon twenty-four men as the "standing jurors" of the term. Section 30 provided that no standing juror "shall depart the court without leave." Section 33 provided that such standing jurors were entitled to the same pay as grand jurors (\$1.50 per diem and mileage), and on request were entitled to scrip payable out of the county treasury.

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The foregoing statutes clearly differentiate between "standing jurors" who were paid a specified sum out of the county treasury and those jurors who were summoned for the trial of a particular case and for which service were entitled to a fee which should be taxed and collected as other costs in the case.

In the Revised Statutes of 1879, provision was made for regular panels consisting of twenty-four standing jurors for each term of court. By this time, our present statutes relating to jury compensation began to take shape. It was provided that each petit juror on the regular panel shall receive one dollar and fifty cents per day plus mileage and be entitled to scrip payable out of the county treasury. Sections 2790, 2792, 2794 RSMo 1879.

So, too, in Section 2798 RSMo 1879, it was provided that all petit jurors not included in the regular panel "shall receive for their services as such juror one dollar per day which shall be taxed as costs in the case." Other provisions related to obtaining jurors when the regular panel was unavailable or exhausted. However, by this time it was mandatory that there be a regular panel of jurors summoned for service at each term of court. It was in the revision of 1879 that present Section 494.160 first appeared as Section 2799. It provided:

"Whenever any jury provided for in this chapter shall serve in the trial of any case, other than criminal, there shall be taxed against the unsuccessful party and collected as costs the sum of twelve dollars as jury fees, which, when collected shall be paid to the county treasury to the credit of the county revenue fund."  
(Emphasis supplied.)

It is therefore apparent that as of the time the 1899 act was enacted, jurors who made up the regular panel were paid only out of the county treasury. Moreover, from the very first of the statutes relating to standing jurors, the concept was always that they should be paid out of the county treasury. On the other hand, in the earlier stages of our statutory history, jurors who were summoned for service in a particular case or who were not on the regular panel received a lesser amount as fees, and such fees were always to be taxed as costs in the cases in which they

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served. From the very inception of standing or regular jurors, there never was any provision for taxing their fees as costs in any case in which they may have served.

It would appear therefore that the compensation paid to the regular jurors was considered as part of the general expense of operating the court system, similar to other expenses such as the cost of providing and maintaining the courthouse and providing judges to sit at the trials, no part of which expenses is paid by the litigants. The compensation paid to regular jurors was payable for each day they attended court pursuant to their summons as regular jurors, irrespective of whether they actually served in a case or whether they served in more than a single case in any one day. Moreover, it was wholly coincidental whether such regular jurors served in a civil or criminal case. Their right to compensation depended solely upon their attendance in court pursuant to summons. The service of the regular juror was not necessarily identifiable with a particular case, and never was intended to be so. On the other hand, jurors who were not on the regular panel were summoned for service only when such service was necessary in a particular case. For such reason, the fees payable to such jurors (not on the regular panel) necessarily constituted compensation for service in the case for which they were summoned, and their fees were by force of statute taxable as part of the costs in that particular case.

Summarizing, as of 1899, no fees payable to jurors were taxable as costs except only those fees payable to jurors who were not on the regular panel. It is of significance that Section 2799, RSMo 1899, provided for taxing against the unsuccessful party a jury fee of twelve dollars in cases "other than criminal." This statute was no doubt enacted for the purpose of partially reimbursing the county for the expense of regular jurors in civil cases. However, the twelve-dollar jury fee was not intended as a substitute for jury fees theretofore taxable as costs, but was additional thereto. In civil cases, only the twelve-dollar fee was taxable when regular jurors served in the trial of the case, while in criminal cases no jury fees at all were taxable with respect to regular or standing jurors. In the latter cases, only those fees of jurors who were not on the regular panel were taxable as costs. Had it been intended to provide that the fees paid to regular jurors should be taxable as costs, it is obvious that language expressive of such purpose would have been available, just as in the case of jurors who were not included in the regular panel.



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With the foregoing in mind, we consider Section 550.280 for the purpose of determining what was intended thereby and what changes were effected by that section. Our study has led to the conclusion that Section 550.280 was not intended to authorize the taxation of jury fees as part of the costs in any situation in which such fees were not theretofore required to be taxed as costs.

Section 550.280, above quoted, was Section 3 of an act entitled "An Act in relation to the payment of criminal costs and for other purposes relating thereto, with emergency clause." Except for slight revisions, not here material, Sections 550.260 to 550.300 RSMo 1959, both inclusive, constitute the Act of 1899.

In construing Section 550.280, the entire act must be read as a whole, considered in the light of the theretofore existing state of law relating to jury fees and compensation. See St. Louis Southwestern Railway Co. v. Loeb, Mo.Sup., 318 SW2d 246, 252, in which the Court held:

"Generally, we must seek to gather the intent of the legislature from the ordinary meaning of the words used, considering the whole Act and its legislative history, and if necessary, considering also the circumstances and the usages of the time; and we must seek to promote the purpose and objects of the statute, and to avoid any strained or absurd meaning."

So read, the evident purpose of the Act of 1899 was to make all fees payable taxable as costs in criminal cases subject to the prior lien of the state and county for certain indebtedness. In effect, the Act provides for the coercive payment (by persons claiming fees in criminal cases) of delinquent personal taxes, fines, penalties, forfeitures, or forfeited recognizances, costs in criminal cases and for contempt of court and of indebtedness on account of funds coming into the hands of claimants by reason of any public office.

Section 550.270 RSMo 1959 specifically provides that before any fees in criminal cases may be paid "to the proper owners as the same may be called for" the party to whom the same is due "shall furnish satisfactory evidence to the treasurer" that he or she is not indebted to the state or county in the respects above set forth. The amount of any such indebtedness is required

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to be deducted from the fees payable to the claimant, and if such indebtedness exceeds the amount of the fees, then the claimant is given credit for the amount thereof. Even taking the "oath of insolvency" does not defeat the right of set-off.

Section 550.290 RSMo 1959 emphasizes the statutory intent by providing that all fees coming within the scope of the statute "shall not be negotiable or assignable except subject to all the set-offs herein provided for, and that the state and county holds a prior lien on the same for the purpose of indemnification against loss by reason of the nonpayment of personal back taxes, and for the payment of the fines, penalties, forfeitures, and costs herein mentioned."

Bearing in mind the statutory purpose relating to offsets, it simply makes no sense to attribute to the Legislature from the language of the section, an intent to make a distinction between the members of the same regular panel by making a portion of the scrip received by some of the panel subject to offsets to the extent they chanced to serve in criminal cases, while the remainder was not. And what of those who served in both a civil and criminal case the same day? Would all or part of the indivisible per diem of such jurors be subject to offsets? The juror receives "a scrip" showing the amount which he is entitled to receive out of the county treasury. Section 494.140 RSMo 1959. There is no provision for issuing a series of scrips, some listing the criminal cases and the days served therein, some listing the civil cases and time spent, and others listing the days on which the juror served in no case at all.

With specific reference to Section 550.280, it is to be noted that it sets forth three different categories of fees which "shall be deemed criminal costs" (for the purpose of the Act of 1899) and which are to be paid in like manner and subject to all the offsets provided for in the Act. In addition to "all fees due jurors in any criminal case" (the language which is here for construction), the section covers (1) "all fees due witnesses before the grand jury," and (2) "all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death other than unavoidable accident or natural causes."

It would appear obvious that if all compensation payable to jurors who serve in connection with any criminal case is taxable as costs, then all of the other fees mentioned in the section would also be taxable as costs. Yet we have found no provision in our statutes for taxing, as part of the costs in a criminal

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case, fees which are due witnesses before the grand jury. Many of such witnesses testify on matters which cannot be identified with any specific case. In addition, many of such witnesses testify in connection with investigations in which no true bills are returned. Yet here too, as in the case of jurors, the all-inclusive word "all" is used.

So, also, as to fees accruing in inquest cases, we are aware of no provision in our statutes for taxing such fees as part of the costs in any criminal case. Yet the statute provides that "all" such fees shall be "deemed" criminal costs, but only where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes. This is true whether or not the verdict names a person responsible for the death. It is true even when a person is named, irrespective of whether the deceased came to his death by criminal means or by justifiable homicide. When Section 550.280 is read as part of the whole Act of 1899, we can find no intent to make any of the fees therein specified taxable as part of the costs in a criminal case in situations where such fees were not theretofore taxable as costs. That section pertains only to the payment, not the taxation, of the fees referred to therein.

The case of Scott v. Young, 113 Mo.App. 46, 87 SW 544, provides a clue as to the purpose and meaning of Section 550.280, even though that was a civil case decided in 1905. The statutes construed in that case were the statutes above quoted from the Revised Statutes of 1899. The Court there held with respect to jurors on the regular panel:

"It is clear under this section that the county, and not the litigant, pays the expense of the regular panel." (Emphasis supplied.)

The Court then considered the statutes relating to jurors not on the regular panel and took note of the fact that even they were entitled to receive scrip out of the county treasury. Said the Court (87 SW, 1. c. 546):

"It is apparent from these sections that the county pays the jury in the circuit court. This is true as to the regular panel and jurors summoned which are not of the regular panel, each likewise receive scrip from the clerk, and are paid

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by the county out of the county funds. While fees for their services may be taxed, according to the statute, against the unsuccessful party to the suit, these fees, when so taxed and collected, are paid into the county treasury by way of reimbursing the treasury for moneys paid out by it theretofore in payment of the jury service in that particular case." (Emphasis supplied.)

Inasmuch as jurors not on the regular panel had the right to receive scrip payable out of the county treasury without regard to the ultimate outcome of the case in which they served or the time the costs in such case were finally taxed, the Act of 1899 would have failed in its purpose in part if such jurors could escape payment of their indebtedness by requesting scrip immediately payable rather than waiting for the payment of their fees when taxed in the case. Hence, the purpose of Section 550.280, in so far as it affects jurors serving in a criminal case, was to make certain that fees due jurors not on the regular panel would be subject to the offsets provided for by the Act even if such jurors received scrip in payment for their services. When the statute is so construed, a consistent pattern in this section becomes obvious. Witnesses before the grand jury were also issued scrip which was payable out of the county treasury. (Section 3260 RSMo 1899.) Our present statutes contain a similar provision (Section 491.290 RSMo 1959). With respect to fees due in inquest cases, Section 6653 RSMo 1899 (now Section 58.570 RSMo 1959), provided for a certification by the coroner to the county court of the various fees accruing in such cases, with the requirement that the county treasurer pay to each such person on demand the fees to which he is entitled. Other sections of the statutes relating to coroners and inquests which need not here be reviewed fortify the conclusion that what was intended was that fees in those cases described in Section 550.280 should not be paid by the county treasurer until the claimant furnished the necessary evidence.

Note that the section provides that such fees "shall be paid in like manner and shall be subject to all the offsets herein provided." This can mean only that the fees described in said section shall be paid by the county treasurer in the same manner as other fees listed in the fee bill which are subject to the statute are paid. That is to say, in all such instances, as a condition precedent to payment, satisfactory



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evidence must first be furnished the county treasurer respecting the absence of indebtedness.

Section 550.280, strictly construed, contains no provision whatever respecting the taxation of criminal costs or the creation of additional taxable costs. As the title of the Act makes clear, it relates to the payment of costs. Nothing in the title indicates that the Legislature intended to create additional items of criminal costs not theretofore part of the costs of a case. The title of an act is a part thereof and must be taken into consideration in ascertaining the legislative intent. A. J. Meyer & Co. v. Unemployment Compensation Commission, 348 Mo. 147, 152 SW2d 184. It "is itself a legislative expression of the general scope of the bill." Hurley v. Eidson, Mo.Sup., 258 SW2d 607, 610. The very fact that the section provides that the fees therein specified shall be "deemed" criminal costs, rather than "taxed as part of the costs," impels the conclusion that what is meant is simply that for the purpose of the offsets described in the Act, such items shall be treated and paid by the county treasurer in the same manner as criminal fees, rather than as civil fees are treated and paid.

We further note the fact that the section relates to fees of jurors in any criminal case. Jurors on the regular panel do not receive any fees for service in any particular case, as we have noted above. Hence under any view of the section, jurors on the regular panel who are paid for service as jurors generally without regard to the character of any particular case in which they might serve, or whether they serve in any case at all receive no fees for service "in any criminal case." As for jurors not on the regular panel, under the state of the law in 1899 such fees were already taxable as costs, so that the section applied to such jurors only to the extent that they were entitled to and received scrip in payment for their services in lieu of the fees which might thereafter be taxed in the case.

Finally, in construing the Act of 1899 and deriving a purpose therefrom, we take note of the emergency clause contained in Section 8 of the Act:

"There being now a large amount of delinquent personal taxes due the state and counties, and many fines and forfeitures unpaid, and the further fact that there is a deficiency in the state revenues, and a large amount of criminal costs unpaid, creates an emergency

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within the meaning of the constitution;  
therefore this act shall be in force from  
and after its passage."

The very fact that there was a deficiency in the state revenues would make it obvious that the Legislature could not have intended to add to said deficiency by making the state liable for additional costs. So, too, the fact that a large amount of criminal costs were unpaid would not be an inducement to enlarge such amount by creating additional costs. The emergency clause makes evident the legislative purpose of protecting the state revenues and decreasing the amount of criminal costs which might remain unpaid by providing that all fees described in the statute for which the state was already liable should be subject to the offsets therein provided for.

As further evidencing the legislative intent to decrease the deficiency in the state revenues, we note the provision (now Section 550.300) that all uncalled for fees paid by the state shall be paid into the state treasury. Prior to this Act, the Supreme Court had ruled (in 1886) that such uncalled for fees, although paid by the state, must be paid into the county treasury. See City of St. Louis v. Clabby, 88 Mo. 573. We further note that the same General Assembly enacted another statute (now Section 550.160 RSMo 1959) which prohibited the allowance of fees to public officers testifying before a coroner's inquest, grand jury and in criminal cases except in certain instances (Laws 1899, p. 221) with the following emergency clause:

"The immediate necessity for a reduction  
of criminal costs in this state creates an  
emergency within the meaning of the consti-  
tution."

Under ordinary circumstances, all jurors who serve in St. Louis County are members of the regular panel. Chapter 496 of the Revised Statutes of 1959 provides for a general panel of jurors for all divisions of the court (Section 496.060). Whenever any division of the court requires a panel for the trial of a case, a sufficient number of jurors from the full panel is required to be sent to such division (Section 496.070). The only specific reference in Chapter 496 to jurors not on the regular panel is contained in Section 496.080, which provides that when a jury for the trial of a case cannot be made up "from the regular panel," then the judge, by agreement of all the



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parties, may make out and deliver to the proper officers a list of jurors sufficient to complete the panel, but who "shall be summoned only for the trial of that particular cause."

Inasmuch as Chapter 496 contains no provision for payment of jurors, it follows that jurors who constitute the general or regular panel receive compensation for their services under the general provisions of the law (Ch. 494, RSMo 1959). The jurors who are on the general panel remain in the jury room in charge of the sheriff except when engaged in the trial of a case or thereafter excused by a judge. Section 496.060. As above noted, such jurors are not paid for service in a particular case, civil or criminal, and in fact may not serve in any case. They are paid for their services for attending and remaining in court pursuant to summons. As part of their services as jurors they may serve in a criminal case, but no fee is due such jurors specifically for services in such case.

It is conceivable, although unlikely, that by reason of challenges for cause in a particular case the general or regular panel in St. Louis County may be exhausted, in which case it would be necessary to call extra jurors for service in that case. In such situation, the provisions of Chapter 494 relating to compensation of jurors not on the regular panel would also be applicable. Prior to 1919, the fees of extra jurors, not part of the regular panel, who served on the trial panel under what is now Section 494.110, or who were summoned in the cases described in what is now Section 494.120, were taxable as costs. However, by reason of the 1919 amendment to Section 494.110, above noted (Laws 1919, p. 433), such fees, now six dollars per day (although paid for services in the particular case in which they serve or were summoned), are no longer taxable as costs. Since 1911 (Laws 1911, p. 383) all other extra jurors who are summoned for a particular case but do not serve in the trial are entitled to fees, which are still taxable as costs in the cases in which they were summoned. Presently, their compensation is three dollars per day (Section 494.170). It would appear that piecemeal amendments to the statutes were responsible for the present situation.

It follows from the foregoing that the clerk of the circuit court of St. Louis County is not authorized to tax as part of the costs in a criminal case the compensation payable under Sections 494.100, 494.110 and 494.120 to the jurors who serve

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or who are summoned in connection with such case. However, the fees of all other jurors, not members of the regular panel, who are summoned for a particular case, but do not serve therein, and whose compensation is not provided for otherwise than by Section 494.170, are to be taxed as costs.

#### CONCLUSION.

It is the opinion of this office:

- 1) The state is not liable for any jury fees in criminal cases except only such jury fees as are taxable as costs pursuant to express statutory authorization in those cases in which the state is liable for costs.
- 2) Members of the regular panel of jurors receive six dollars per day for each day of service, and mileage, payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 3) Jurors not on the regular panel who serve in a particular case receive six dollars per day for each day of service as jurors, and mileage, also payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 4) Jurors who are summoned in any of the cases described in Section 494.120, but who do not serve in the trial of such cases, receive six dollars per day for each day they are in attendance on the court, and also receive mileage if they have traveled at least one mile in obedience to the summons, payable out of the county treasury. No part of such compensation may be taxed as costs.
- 5) Jurors, not members of the regular panel, who are summoned in all cases other than those described in Section 494.120 but do not serve in the trial of the cases, receive fees in the sum of three dollars per day for each day of attendance. The fees allowed to such jurors are to be taxed as part of the costs in the cases in which such jurors were summoned.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

Opinion No. 138 answered by  
letter (Nessenfeld)

No. 6 (1963)

January 4, 1963



Honorable Michael Kinney  
Senator, Fifth District  
Holland Building  
St. Louis, Missouri

Dear Senator Kinney:

Enclosed is copy of opinion dated January 4, 1963,  
to Hon. Norman Anderson which rules the liability of the  
State in connection with jury fees and the right to tax  
such fees as part of criminal costs. In that opinion, we  
ruled as follows:

- 1) The State is not liable for any jury fees in criminal cases except only such jury fees as are taxable as costs pursuant to express statutory authorization in those cases in which the State is liable for costs.
- 2) Members of the regular panel of jurors receive six dollars per day for each day of service, and mileage, payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 3) Jurors not on the regular panel who serve in a particular case receive six dollars per day for each day of service as jurors, and mileage, also payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 4) Jurors who are summoned in any of the cases described in Section 494.120, but

who do not serve in the trial of such cases, receive six dollars per day for each day they are in attendance on the court, and also receive mileage if they have traveled at least one mile in obedience to the summons, payable out of the county treasury. No part of such compensation may be taxed as costs.

5) Jurors, not members of the regular panel, who are summoned in all cases other than those described in Section 494.120 but do not serve in the trial of the cases, receive fees in the sum of three dollars per day for each day of attendance. The fees allowed to such jurors are to be taxed as part of the costs in the cases in which such jurors were summoned.

You will note that, by and large, jury costs in St. Louis County may not be taxed as part of the costs. In view of the fact that jurors in said county are normally selected from the regular panel, it is extremely unlikely that any jury costs pursuant to Section 494.170 would be taxable as costs in cases in such county.

In the event a situation would ever arise in which any of such jury fees would be taxable in criminal cases, such costs when paid by the State, just as all other costs certified in the fee bill to which the county is entitled, would be paid into the county treasury and could be expended only by appropriation of the county council.

I note that the county council has now provided for a public defender and appropriated funds for his salary, so that the question presented by your opinion request is essentially moot.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr  
Enclosure

Opinion No. 140 answered  
by letter (Nessenfeld)

*No. 7 (1963)*

January 4, 1963



Honorable Charles D. Trigg  
Comptroller and Budget Director  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Trigg:

You have made inquiry concerning the amount payable to jurors. Enclosed is copy of opinion dated January 4, 1963, to Hon. Norman Anderson, which rules the question of the liability of the State with respect to jury fees and the amounts payable. Our conclusions in this opinion are as follows:

- 1) The State is not liable for any jury fees in criminal cases except only such jury fees as are taxable as costs pursuant to express statutory authorization in those cases in which the State is liable for costs.
- 2) Members of the regular panel of jurors receive six dollars per day for each day of service, and mileage, payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 3) Jurors not on the regular panel who serve in a particular case receive six dollars per day for each day of service as jurors, and mileage, also payable out of the county treasury. No part of such compensation may be taxed as part of the costs.
- 4) Jurors who are summoned in any of the cases described in Section 494.120, but



who do not serve in the trial of such cases, receive six dollars per day for each day they are in attendance on the court, and also receive mileage if they have traveled at least one mile in obedience to the summons, payable out of the county treasury. No part of such compensation may be taxed as costs.

5) Jurors, not members of the regular panel, who are summoned in all cases other than those described in Section 494.120 but do not serve in the trial of the cases, receive fees in the sum of three dollars per day for each day of attendance. The fees allowed to such jurors are to be taxed as part of the costs in the cases in which such jurors were summoned.

You will note that in the only situations in which jury fees may be taxed as costs and for which the State could be liable (those fees coming within the provisions of Section 494.170 RSMo 1959), we have not included mileage. In our opinion, Section 494.170 may not be construed to allow mileage to jurors who are summoned and attend court but who do not serve in the trial.

In State v. Williams, 92 Mo.App. 443, the Court construed the predecessor of Section 494.170 which at that time, in the situations where it was applicable, allowed a per diem for each juror attending a trial. The Court held that unless the juror actually attended a trial, there was no warrant in law for taxing his fees as costs. In 1911 this statute, insofar as it pertained to the per diem, was amended so that such jury fees are payable if the juror is summoned and attends court. However, the provision in such statute which relates to mileage has remained unchanged except with respect to the amount allowed. That statute still permits mileage only for each mile traveled "in attending any trial." Inasmuch as such jurors do not attend a trial, but simply attend court, it would follow, under the ruling in the Williams case, that mileage may not be allowed or taxed as costs. We note that Section 494.120 RSMo 1959, which is the only other section allowing compensation (in certain situations) to jurors not on the regular panel who attend court



Honorable Charles D. Trigg      - 3 -

but do not serve in the trial, mileage is expressly allowed (but only if the juror has traveled at least one mile) for attending court.

Prior opinions of this office, inconsistent with the conclusions herein set forth, have been withdrawn and should no longer be followed.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr

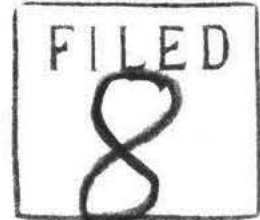
Enclosure

JURORS: Regular jurors who are required to and who actually  
JURY FEES: travel each day for which such mileage is claimed  
MILEAGE: from their place of residence to the courthouse are  
entitled to mileage as well as per diem for each day  
of service as such jurors.

January 4, 1963

*Op. No. 151*  
*No. 8 (1963)*

Mr. Robert Devoy  
Prosecuting Attorney  
Linn County  
Brookfield, Missouri



Dear Mr. Devoy:

Reference is made to your request for an official opinion of this office, which reads as follows:

"As Prosecuting Attorney in and for Linn County, Missouri, I wish to request the Attorney General's opinion construing Section 494.100, Missouri Revised Statutes, 1959.

"The question has arisen as to whether the Circuit Clerk is authorized to pay members of the regular petit jury panel mileage in travelling from the juror's place of residence to the courthouse and return for each day that a trial may last."

Section 494.100 RSMo 1959 states as follows:

"Each grand and petit juror on the regular panel shall receive six dollars per day, for every day he may actually serve as such, and seven cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

The foregoing statute fixes the compensation of regular jurors at a fixed rate per day, plus mileage. Mileage is

Mr. Robert Devoy

paid only for the number of miles "necessarily traveled." The word "necessarily" in this context has reference to the number of miles it is necessary to travel by the most practicable and usually traveled route. Ferguson C. McDaris Lumber Co. v. John Tiede & Co., 130 Mo.App. 269, 109 SW 850. As so understood, however, mileage constitutes a portion of the juror's compensation.

It is a familiar rule of statutory construction that all words in a statute be given effect, where possible, in order to effectuate the legislative intent. The language of Section 494.100 evidences the legislative intent to compensate regular jurors for every day they "actually serve as such." For each such day, a juror is to receive compensation at the fixed rate of six dollars per day and mileage. The statute plainly provides that both elements of the juror's compensation shall be paid "for every day he may actually serve as such." These words clearly apply to mileage as well as to per diem. Otherwise, the words "per day" would serve no purpose and would constitute surplusage.

#### CONCLUSION.

It is our opinion that regular jurors who are required to and who actually travel each day for which such mileage is claimed from their place of residence to the courthouse are entitled to mileage as well as per diem for each day of service as such jurors.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr

POINT SYSTEM:  
DRIVER'S LICENSE:  
DRIVING WHILE INTOXICATED:  
FELONY:  
CRIMINAL LAW  
MOTOR VEHICLES:

Under Section 302.302.(7), RSMo Cum. Supp. 1961, 12 points may be assessed only in those cases where an individual has been convicted of driving under influence of intoxicating liquors in violation of Sections 564.420, 564.430 and 564.440, RSMo 1959.

June 14, 1963

OPINION NO. 10

Honorable John K. Leopard  
Prosecuting Attorney  
Davless County  
Gallatin, Missouri



Dear Mr. Leopard:

This is in reply to your opinion request in which you state:

"I have been requested by the Magistrate of this county to write to your office for an opinion concerning the interpretation of Section 302.302 (1) (7), Laws 1961. This section requires the assessment of points after convictions of traffic violations, and the applicable part reads as follows:

"(7) Driving under the influence of intoxicating liquor or narcotic drugs  
In violation of state law.....12 points"

"The specific question on which the opinion is requested is as follows:  
Whether or not such provision requires a conviction of a felony under Section 564.440 before 12 points may be assessed, or whether or not such 12 points may be assessed on a conviction of careless and imprudent driving or on a conviction of any other moving traffic violation where the evidence shows the defendant to have been driving under the influence of intoxicating liquor.

"Section 302.302, supra, requires that the defendant be driving 'under the influence

of intoxicating liquor,' while Section 564.440 requires that the defendant be operating a motor vehicle 'while in an intoxicated condition.' It would appear that a person could be 'under the influence' and yet not be 'in an intoxicated condition,' and that is the reason why your opinion is requested."

Section 302.302, RSMo 1961 Cumulative Supplement, states in part:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows:

\* \* \* \* \*

"(7) Driving under the influence of intoxicating liquor or narcotic drugs  
In violation of state law....12 points  
In violation of a county or municipal ordinance.....6 points".

This section specifically provides that twelve points be assessed for the violation of state law and six points for the violation of a county or municipal ordinance of driving under the influence of intoxicating liquor.

Section 302.302 does not create a new criminal offense but designates points to be assessed for violations of other statutes.

The language of this section clearly indicates that the legislature intended these respective points to be assessed upon conviction of a particular offense, to-wit: driving a vehicle while under the influence of intoxicating liquor.

The only state statutes regarding this particular type of offense to be found in the Missouri statutes are Sections 564.420, 564.430, and 564.440, RSMo 1959, which state:

564.420 - "Every person who, whilst actually employed in driving any stage,

coach, wagon, omnibus, hack or other vehicle, shall be intoxicated to such a degree as to endanger the safety of any person therein, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by fine not less than twenty nor more than one hundred dollars."

564.430 - "Every person who, whilst actually employed in discharging the duties of a pilot or engineer on any steamboat, or of an engineer or conductor on any railroad engine, car or train of cars, or of a motorman or conductor on any electric car or car moved or propelled by any other power, shall be intoxicated, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars."

564.440 - " No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

A review of Section 302.302, RSMo 1961 Cumulative Supplement, discloses that the legislature enumerated the points to be assessed by the Director of Revenue against an individual driver who had been convicted of certain specific offenses.

Because of the specificity of the offenses listed in said section, and the fact that the section differentiated in the amount of points to be assessed for a conviction of state and county or municipal violations of the particular offense of "driving under the influence of intoxicating liquor or narcotic drugs," the legislature must necessarily have had in mind the convictions under Sections 564.420, 564.430 or 564.440, RSMo 1959.

In addition, authority is to be found which provides that the phrase "under the influence of intoxicating liquor" and "in an intoxicated condition" are substantially synonymous.



In State v. Dudley, 159 La. 872, 106 So. 364, the Louisiana court, in holding that the term "under the influence of intoxicating liquor" contained in a city ordinance making it unlawful to drive a motor vehicle upon the streets while under the influence of intoxicating liquor was exactly synonymous with the term "in an intoxicated condition" used in a state statute of similar design, stated:

"And we are of the opinion that the term 'under the influence of liquor' has a well-recognized meaning with every one, which is exactly synonymous with the term 'in an intoxicated condition'."

In Holley v. State, 25 Ala. App. 260, 144 So. 535, the Alabama Court of Appeals affirmed a conviction notwithstanding the fact that the affidavit filed in common pleas court charged defendant with driving an automobile "while intoxicated," whereas the information filed on appeal in the circuit court charged the defendant with driving a vehicle on the highway while "being under influence of intoxicating liquors."

In stating that there was no variance between the terms, the Court stated:

"The argument is made that there is a material substantial difference between 'being under the influence of intoxicating liquors' and 'being intoxicated'. The difference is that of 'Tweedle dee and Tweedle dum'. If a man is under the influence of intoxicating liquors, he is intoxicated, and, if he is intoxicated within the meaning of this statute, he is under the influence of intoxicating liquor."

#### CONCLUSION

In order to assess twelve points for a conviction of "driving under the influence of intoxicating liquor or narcotic drugs" in violation of state statutes as provided

Honorable John K. Leopard - 5

in Section 302.302, RSMo 1961 Cumulative Supplement, one must be convicted under Sections 564.420, 564.430 or 564.440, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

GD:bj-df

NURSING HOMES: A county is authorized to issue bonds and purchase  
BONDS: a nursing home owned and operated by townships  
TOWNSHIPS: within the county. The county may issue bonds for  
COUNTIES: the construction and equipment of additions to the  
nursing home. The townships have authority to  
sell the nursing home. The townships are obligated  
to pay the bonds issued by the townships for the  
original purchase and construction of the nursing  
home.

OPINION NO. 11

May 29, 1963



Honorable J. W. Colley  
Prosecuting Attorney  
Dade County  
Greenfield, Missouri

Dear Mr. Colley:

Your request for an official opinion reads:

"The County Court of Dade County has asked me to write you for an opinion on the following proposition:

"Dade County is a Township organization and about 2 years ago the townships of Lockwood and Smith voted a \$50,000.00 bond issue and erected the Good Shepherd Rest Home. They were assisted financially by John C. Maybee and the Hill - Burton Fund.

"They now have a plan to enlarge the building and apparently the John C. Maybee Foundation of Tulsa, Oklahoma, is now willing to assist in the expense of the addition to the building. The Hill - Burton fund is also willing to assist in this construction.

"The County Court wishes to know if county wide bonds can be voted and the money used, first - to pay the present bonds owed by Smith and Lockwood Townships and second - to pay for the construction of the additional space as needed.

Honorable J. W. Colley

"When the Good Shepherd Rest Home was established and the bonds voted only two townships in Dade County participated. This was done under Sec. 205.375 which was amended so that the townships could legally operate a rest home."

In your opinion request, you refer to Section 205.375, RSMo, and we quote a portion of that section as follows:

"2. The county court of any county or the township board of any township may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies, and services necessary to carry out such purposes.

"3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions."

In your request you state that the townships of Lockwood and Smith voted a \$50,000.00 bond issue and erected the Good Shepherd Rest Home. We assume that these are general obligation bonds rather than revenue bonds. Such general obligation bonds are an indebtedness of Lockwood and Smith townships which voted and issued them. Assuming that the bonds were validly issued, Lockwood and Smith townships are obligated to pay them. They are obligations of the townships and of the townships alone, and we know of no statutory authority or method of shifting the responsibility for the payment of this obligation from Lockwood and Smith townships to Dade County. The first part of your question is whether funds from bonds voted and issued by the county can be used to pay the present bonds owed by Smith and Lockwood townships. You do not give any information concerning the procedures, methods or mechanics involved in the payment of the township bonds by the county. In subsequent correspondence you indicated that Smith and Lockwood townships will sell the Good Shepherd Rest Home to Dade County. We first deal with the authority of such a sale and purchase.

Honorable J. W. Colley

In regard to the authority of Lockwood and Smith townships to sell the Good Shepherd Rest Home to Dade County, we call your attention to Section 65.270, RSMo, which reads as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

In view of this section, it is essential that Lockwood and Smith townships have specific statutory authority for the sale of the Good Shepherd Rest Home. The only statute we have found which can be construed to give such authority is Section 65.260, RSMo, which provides that each township shall have power and capacities:

"(4) To make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof."

It is our opinion that this is sufficient authority for the sale of the Good Shepherd Rest Home by Lockwood and Smith townships to Dade County if such disposition is conducive to the interest of the inhabitants of the townships.

Dade County has statutory authority to purchase the Good Shepherd Rest Home. The county court is authorized by Section 205.375, RSMo, to:

"(2) . . . acquire land to be used as sites for [nursing homes] . . . ."

"Land" has been given the common-law definition in Missouri which "includes all buildings of a permanent nature standing thereon" as well as the land. Union Central Life Insurance Co. v. Tillery, 152 Mo. 421, 54 S.W. 220. Bituminous Casualty Corp. v. Walsh and Wells (Mo. App.), 170 SW2d 117.

"Site" is defined in Webster's New International Dictionary, 3rd Edition, as: "2(a) the local position of building, town, monument, or similar work either constructed or to be constructed; (b) a space of ground occupied or to be occupied as a building."

Honorable J. W. Colley

"Land" and "site", then, include both the land and the buildings thereon, so that under the most liberal construction of the phrase "acquire land to be used as sites for", the county court may acquire land with buildings thereon for the purpose of establishing a nursing home.

In addition the general statutes give county courts power to acquire land. Section 49.270, RSMo 1959, provides:

"The said court shall have . . . power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; \* \* \*." (Underscoring ours)

As a nursing home is for the use and benefit of the county, the county court may acquire land therefor by purchase, lease or by donation.

We assume that the bonds to be voted by Dade County are general obligation bonds rather than revenue bonds and therefore this opinion is limited to the issuance of general obligation bonds and we are not making any ruling relative to the use of revenue bonds.

Issuance of general obligation bonds by a county and indebtedness of a county are covered by Article VI, Section 26(a), 26(b), and 26(c), Missouri Constitution 1945, and by Chapter 108, RSMo 1959. Sections 108.010 and 108.020, RSMo 1959, provide:

"108.010. Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

"108.020. Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."



Honorable J. W. Colley

Under these provisions a county may incur an indebtedness for county purposes not to exceed ten per cent of the value of the taxable tangible property shown at last completed assessment for county purposes. It would be necessary to determine that the amount to be expended in the acquisition of the land and buildings will not exceed this limit before the indebtedness may be incurred to acquire such land and buildings.

The conclusions we have reached thus far are that Lockwood and Smith townships have authority to sell the Good Shepherd Rest Home to Dade County and Dade County has authority to purchase the Good Shepherd Rest Home from Lockwood and Smith townships. Lockwood and Smith townships will still be obligated to pay the bonds issued by the townships, the proceeds of which were used to purchase and construct the Good Shepherd Rest Home. Dade County has authority to issue county-wide bonds and use the proceeds for the purchase of the Good Shepherd Rest Home. We do not make any ruling concerning the procedures, mechanics or other financial arrangements which may be involved in the sale or purchase.

In the absence of specific facts on the exact methods and procedures by which the money from the county bonds is to be used to pay the present bonds owed by Smith and Lockwood townships, we are unable to give an opinion as to their validity and the conclusions we have reached and stated above must suffice as an opinion on the first part of your question.

In answer to the second part of your question we are of the opinion that the county court may issue county-wide bonds to pay for the construction of additional space for the nursing home. Authority for this is found in Section 205.375, supra, which provides:

"3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions."

Honorable J. W. Colley

By this subsection, funds for the construction and equipment of nursing homes may be provided by the issuance of general obligation bonds under the general law regulating the incurring of indebtedness, and subject to the limitation of the constitution and statutes. In our opinion this includes the construction and equipment of such additions to the nursing home.

CONCLUSION

It is therefore the opinion of this office that Lockwood and Smith townships may sell and Dade County may purchase the Good Shepherd Rest Home. Lockwood and Smith townships are obligated to pay the bonds issued by those townships for the original purchase and construction of the Good Shepherd Rest Home. Dade County is authorized to issue county-wide bonds and use the proceeds for the purchase of the Good Shepherd Rest Home. Dade County may issue general indebtedness bonds and use the proceeds for the construction and equipment of additions to the Good Shepherd Rest Home.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

WWW:lt:jh

SCHOOL RECORDS:  
MUNICIPAL CORPORATIONS:  
CONTRACTS:  
PUBLIC RECORDS:  
RECORDS:

School districts may be termed "Municipal Corporations". Records and contracts required by statute to be kept by school districts are within the scope and effect of Sections 109.180 and 109.190 RSMo. Cum. Sup. 1961, and are open to inspection at all reasonable times. Records required to be maintained by statute are "public records"

February 5, 1963

OPINION NO. 205 (1962)

OPINION NO. 12 (1963)

Honorable Loicen O. Boyd  
Prosecuting Attorney  
Worth County  
Grant City, Missouri



Dear Mr. Boyd:

This opinion is in answer to your inquiry, which is stated as follows:

"Does the public or a taxpayer of a reorganized school district have the right to inspect the minutes of a regular or special meeting of the Board of Education? May the specific contracts or actions of the Board of Education be withheld from inspection by an interested taxpayer?"

You have stated that this is a reorganized school district. In this regard it must be pointed out that the Missouri statutes list only four classifications of schools in Missouri. They are classified as follows by Section 165.010, RSMo 1959:

"The public school districts organized under any of the laws of this state are hereby classified as follows:

"(1) All districts having only three directors are common school districts;

"(2) All districts outside of incorporated cities, towns and villages, which are governed by six directors are consolidated school districts;

"(3) All districts governed by six

Honorable Loicen O. Boyd

directors and in which is located any city of the fourth class, any city organized under a special charter which has less than one thousand inhabitants, or any town or village, are town school districts; and

"(4) All districts in which is located any city of the first, second or third class, or any city organized under a constitutional charter or under a special charter, which has one thousand but not more than three hundred thousand inhabitants, are city school districts."

Therefore, a reorganized school district, which by Section 165.687, RSMo 1959, is organized as a six-director district, must be classified under subsection 2, 3 or 4 of Section 165.010 and be governed by the statutes applicable to them. Further, as stated in State ex rel Reorganized School District of Jackson County vs. Holmes, 360 Mo. 904, 231 S.W. 2d 185, the statutes governing six-director districts must be construed in connection with the general school laws of the State of Missouri.

The primary records and contracts required of school districts within the State of Missouri are set out by the following statutes:

Section 165.213, provides for the organization of the board of directors, the appointment of the various officers of the board, and that the clerk shall keep a correct proceeding of all meetings of the board;

Section 165.220, sets out in detail the duties of the clerk of the school district;

Section 165.273, provides for the manner of consolidation of school districts and of the notices which are required thereunder;

Section 165.320, provides for the organization of the board and the duties of the officers in six-director districts and provides that the duties of the secretary

Honorable Loicen O. Boyd

or clerk shall be the same duties as those set forth for other districts as enumerated in Section 165.220, and other sections concerning common school districts;

Section 165.237, provides that the clerk shall keep certain records which must be furnished to the county clerk and the county superintendent;

Section 163.140, provides for an audit report which must be made public;

Sections 432.070 and 432.080 provide the manner in which a school district must execute contracts and that duplicate copies of every contract which is entered into by a school district must be filed in the office of the county clerk or in such office or with such officer of the school district or other municipal corporation as may be charged with the keeping of the contract.

The above list is not intended to be all inclusive, however, the above sections are the main statutes concerning records and contracts of school districts which are required to be maintained, and we must now determine if any of the above records and contracts are open to inspection by the general public.

In regard to what may be termed public records, Senate Bill 284, 71st General Assembly, enacted in 1961 as Sections 109.180 and 109.190, provide as follows:

"Section 1. Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement.



Honorable Loicen O. Boyd

"Section 2. In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

From a reading of this statute it may be seen that if school district records and contracts may be said to be either state, county or municipal records kept pursuant to the statute, they are then such records as are contemplated by Senate Bill 284, 71st General Assembly, enacted 1961, and are open to personal inspection at any reasonable time by citizens of the State of Missouri.

However, before even considering the effects of Senate Bill 284, 71st General Assembly, it is our opinion that the records and contracts required to be kept by statute are public records and are available for inspection.

The 1943 case of State ex rel Kavanaugh vs. Henderson, 169 S.W. 2d 389, in speaking of records required to be kept by statute held that when any record was required to be kept it became a public record and open to inspection. It is there stated, l.c. 392:



Honorable Loicen O. Boyd

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann.Cas. 1913E, 1208; Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann.Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W. 2d 28."

To the same effect is the case of Disabled Police Veterans Club vs. Long, 279 S.W. 2d 220, where it is stated, l.c. 223:

"[6] Independently of statute the term public records covers not only papers expressly required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office. International Union, etc. v. Gooding, 251 Wis. 362, 29 N.W.2d 730, 735; Conover v. Board of Education, etc., 1 Utah 2d 375, 267 P. 2d 768, 770; People v. Shaw, 17 Cal. 2d 778, 112 P. 2d 241, 259.

"[7] Generally, any writing or document constituting a public record is subject to inspection by the public. State ex rel. Kavanaugh v. Henderson, supra. Nor is it essential that the inspection of public records be limited to persons who have some legal interest to be subserved by the inspection. Neither does it detract from the right to inspect public records that it is done for others for compensation. State ex rel. Eggers v. Brown, etc., 345 Mo. 430, 134 S.W.2d 28. And the right to inspect carries with it the right to make copies. State ex rel. Conran v. Williams, 96 Mo. 13, 19, 8 S.W. 771.

"[8] This right to inspect and to copy

Honorable Loicen O. Boyd

public records is not an unlimited right. It is subject to such reasonable regulations as may be imposed to prevent undue interference with the proper functioning of the public officials involved. State ex rel. Eggers v. Brown, supra."

In Missouri as early as 1888 our Supreme Court in the case of State ex rel. Conran vs. Williams, 96 Mo. 13, 7 S.W. 771, held that any record required to be kept was a public record and thereby open to inspection by the public. From other jurisdictions we find the case of Conover vs. Board of Education of Nebo School District (1954), 267 P. 2d 768, which held that the minutes of a school board meeting were public records and open to public inspection, stating therein, after citing authorities to the contrary, at l.c. 770:

"\* \* \* We believe, however, that the more pertinent cases are found in a long line holding that whenever a written record of a transaction of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, and is kept by him as such, whether required by express provisions of law or not, such a record is a public record.\* \* \*"

The court then continued, at l.c. 771:

"The truth about official acts of public servants always should be displayed in the public market place, subject to public appraisal \* \* \*"

Although there are cases to the contrary, it is believed that the above cases present the sounder view and in light of the right of the general public to know the actions of their public officials the records and contracts required by statute to be maintained by a school district are public records and as such the public has the right to inspect them, which right includes the privilege to copy them subject to reasonable regulations of the official custodian.

Having determined that the records and contracts re-

Honorable Loicen O. Boyd

quired by statute to be kept by school districts, are public records and subject to inspection by the public, we must now determine if they are such records and contracts as contemplated by Section 109.180 and 109.190, RSMo. Cum. Supp. 1961, and in this regard we must determine whether these records and contracts may be rightly termed state, county or municipal records. To do this it is first necessary to determine the status of school districts, for the answer to their status will determine whether their records come within the purview of the above statute.

It is stated in the case of *State ex inf McKittrick vs. Whittle*, 333 Mo. 705, 63 S.W. 2d 100, 1.c. 102, citing *City of Edina to use vs. School District*, 305 Mo. 452, 276 S.W. 112, 1.c. 115:

"Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function and not a special corporate or administrative duty. They are purely public corporations, as has always been held of counties in this state."

It is evident from this statement and from numerous other early Missouri cases that a school district has for a long period of time been classed as a quasi-public or governmental corporation. It may be termed a civil subdivision of the state which is formed for the purpose of aiding in the governmental function of the education of our children.

While there are many older cases in Missouri which hold that a school district is not a "municipality" or a "municipal corporation" it is believed that the more realistic and better view is that set forth in *Laret Investment Company vs. Dickmann*, 345 Mo. 449, 134 S.W. 2d 65, wherein it is stated, 1.c. 68:

"The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed

Honorable Loicen O. Boyd

for the performance of an essential public service. See Dillon on Municipal Corporations, Fifth Ed. Sec. 32.

"This court has adopted the broader definition. In State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.'

"See also State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S.W. 848; Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S.W.2d 151; State ex rel Caldwell v. Little River Drainage District, 291 Mo. 72, 236 S.W. 15; Harris v. William R. Compton Bond Co., 244 Mo. 664, 149 S.W. 603.

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. \* \* \*

The 1941 case of Russell vs. Frank, 348 Mo. 533, 154 S.W. 2d 63, a case in which the legality of a school tax was questioned, stated that a school district is a municipal corporation, and in doing so stated as follows, l.c. 67:

"Appellants also contend that even though this tax be not for building purposes it is authorized under the general powers of the legislature to levy taxes for state purposes non-municipal in their nature.

Honorable Loicen O. Boyd

An elaborate argument, with the citation of many authorities, is made to sustain this point. It will be unnecessary to analyze all of the cases cited because the argument is squarely opposed to the express language of the constitutional provision here involved. The section above cited imposes a special and specific limitation on school taxes. The tax in this case was levied not by the state but by the school district, which is and was a municipal corporation as we have defined that term in *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 S.W. 2d 65. The very purpose for which such municipal corporation is created is that of the maintenance of a school system. \* \* \*

The same reasoning as set forth in the *Russell* and *Laret* cases, supra, was sustained in our Supreme Court in *St. Louis Housing Authority vs. City of St. Louis*, 239 S.W. 2d 289. It is there said, l.c. 294-295:

"\* \* \* Municipality now has a broader meaning than 'city' or 'town', and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. 42 C.J. p. 1413; 61 C.J.S., *Municipal*, page 945; *Curry v. Sioux City Dist. Tp.*, 62 Iowa 102, 17 N.W. 191. But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, 'municipal corporation', in the broader sense now includes public corporations created to perform an essential public service and 'is applied to any public local corporation exercising some function of government'. 'Municipal corporation' now also includes a corporation created principally as an instrumentality of the state but not for the purpose of regulating the internal local and special affairs of a compact community. \* \* \*



Honorable Loicen O. Boyd

Also, school districts have been termed by our federal courts as municipal corporations; *Harrison vs. Hartford Fire Insurance Company of Hartford, Connecticut*, 55 F. Supp. 241.

The views as set out above concerning the municipal status of school districts is reflected to some extent in textbooks on municipal corporations. *Dillon on Municipal Corporations*, Fifth Edition, Section 32; the *Law of Municipal Corporations* by Eugene McQuillin (1949), Volume 1, Section 207, page 451.

As may be seen from the above cases, school districts may be classed as "municipalities" or "municipal corporations" (the terms being used interchangeably). This being so, it would follow that the records and contracts required by statute to be kept would be included within that class of records contemplated by Sections 108.180 and 108.190, RSMo. Cum. Supp. 1961. This is all the more so when we look at the evil and the mischief intended to be corrected by the enactment of these two sections. It is evident that this more liberal interpretation of the term "municipality" or "municipal corporation" is only just and correct.

#### CONCLUSION

Therefore, it is the opinion of this office that:

1. The records and contracts required by statute to be maintained by school districts are public records and are therefore subject to inspection at all reasonable times.
2. School districts within the State of Missouri may be termed "municipalities" or "municipal corporations" and therefore the records of such school districts required by the statutes to be maintained are such records as contemplated by Sections 108.180 and 108.190, Cum. Sup. 1961.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General



No. 13 (1963)

January 4, 1963



Honorable John A. Honssinger  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri

Dear Mr. Honssinger:

You have requested the opinion of this office as follows:

"A felony charge of Grand Stealing was sent on a change of venue from Laclede County to Camden County, Missouri. The case was there tried before a jury. The Circuit Clerk of Camden County has filed, by the approval of myself and Judge Curtis, in accordance with Section 550.130, the costs bill in this case. The costs bill includes the costs of the jury panel. Is Laclede County required to pay, as a part of the costs, the expense of the jury panel from Camden County, Missouri? I have researched Section 550.120 and Section 550.130, but find nothing to satisfactorily answer my problem."

Section 550.120 RSMo 1959 provides in part that in any criminal cause in which a change of venue is taken from one county to any other county and "in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted." Section 550.130 RSMo 1959 provides for the certification of the "bill of costs" in such cases, and its presentation to the county court of the original county, and requires that such cost bills "shall be paid as if the cause had been tried or disposed of in said county."

The foregoing sections are to be read with Sections 550.030 and 550.040, which provide for the liability of the State and county, respectively, for payment of "the costs" where the defendant is convicted and unable to pay the costs, and in cases where the defendant is acquitted.

Your letter does not state whether the defendant was convicted or acquitted, and if convicted, the punishment assessed. If the defendant was convicted and sentenced to imprisonment in the penitentiary, LaCade County would not be liable for any costs in the case, because the liability for taxable costs in such cases would be that of the State under Section 550.030. In all other cases, LaCade County would be liable for all costs which are taxable as such pursuant to express statutory authority.

Costs of a jury, similarly to costs of providing and maintaining the courthouse and the expenses of the salaries of judges and other court officials, constitute part of the costs of the administration of the judicial system and may not be taxed as part of the costs of a specific case absent statutory authorization. It is well settled that the entire matter of costs is a matter of statutory enactment. See Cramer v. Smith, 350 Mo. 736, 168 SW2d 1039, 1040, and State ex rel Clarke v. Wilder, 197 Mo. 27, 32, 94 SW 499. In the latter case it was ruled that "no costs can be taxed except such as the law in terms allows." Therefore, the only question here is whether costs of the jury panel in Camden County may be taxed as part of the costs in the case in question pursuant to any statutory authority.

In an opinion dated January 4, 1963, to Hon. Norman H. Anderson, copy of which is herewith enclosed, this office ruled the question of the right to tax jury fees as part of the costs in criminal cases as follows:

\* \* \* \* \*

2) Members of the regular panel of jurors receive six dollars per day for each day of service, and mileage, payable out of the county treasury. No part of such compensation may be taxed as part of the costs.

3) Jurors not on the regular panel who serve in a particular case receive six dollars per day for each day of service

as jurors, and mileage, also payable out of the county treasury. No part of such compensation may be taxed as part of the costs.

4) Jurors who are summoned in any of the cases described in Section 494.120, but who do not serve in the trial of such cases, receive six dollars per day for each day they are in attendance on the court, and also receive mileage if they have traveled at least one mile in obedience to the summons, payable out of the county treasury. No part of such compensation may be taxed as costs.

5) Jurors, not members of the regular panel, who are summoned in all cases other than those described in Section 494.120 but do not serve in the trial of the cases, receive fees in the sum of three dollars per day for each day of attendance. The fees allowed to such jurors are to be taxed as part of the costs in the cases in which such jurors were summoned.

The foregoing conclusions are applicable in determining the liability of Laclede County for any part of the jury costs if the defendant was not convicted and sentenced to imprisonment in the penitentiary. The conclusions in said opinion will answer the question presented in your request.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr

Enclosure

January 22, 1963



Honorable John A. Honssinger  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri

Dear Mr. Honssinger:

This is in reply to your opinion request of June 16, 1962, in which you ask:

"Does a Magistrate Judge where a criminal charge is pending awaiting preliminary hearing have criminal jurisdiction to appoint an attorney to replace the Prosecuting Attorney under the provisions of Section 56.110 when the charge filed is a mixed felony?"

It is our opinion that in the event you are disqualified under Section 56.110, RSMo 1959, the Circuit Court of Laclede County, not the Magistrate Court, would be the proper Court to appoint a Special Prosecuting Attorney in this particular cause.

In support thereof, we have enclosed this office's opinion of April 24, 1953, to Patrick O. Freeman, Jr., Thayer, Missouri. Said opinion covers the subject of your inquiry, and the reasoning therein is applicable to your situation.

We sincerely appreciate your understanding and patience in the delay of this opinion, which unfortunately was sidetracked under our heavy workload.

Very truly yours,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

Enc.

GD:BJ



January 21, 1963

Honorable Robert A. Bonney  
Prosecuting Attorney  
Wayne County  
Box 248  
Piedmont, Missouri

Dear Mr. Bonney:

We have your request for an opinion of this office as to whether a tract of land owned by the Piedmont Chamber of Commerce, a benevolent association formed pursuant to Chapter 352, RSMo 1959, is exempt from taxation under the provisions of Section 137.100, RSMo 1959. You set out the circumstances involved in the acquisition of this real estate as follows:

"The Chamber acquired by purchase a tract of land of approximately 10 acres in Wayne County. Title was taken in the name of the Chamber. There are no Deeds of Trust or other liens on the premises. It is the desire and hope of the Chamber eventually to either lease or sell the premises to a manufacturing enterprise which would erect a factory on the premises so that the employment opportunities in the area may be increased. The rental which might be received (or the sales proceeds if the premises were sold) would be used for the purposes set out in paragraph four of the Articles. The Chamber has been unable to either sell or lease the premises to date. The property has not been used in any manner and it has not generated any income so far."

Section 137.100(5), RSMo 1959, the only portion of that section relevant here, is as follows:

Honorable Robert A. Bonney

"(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

It can be seen that it is the use of property that is determinative of its tax exempt status. Moreover, that use must be regular and exclusive. St. Louis Gospel Center v. Prose, Mo., 280 S. W. 2d 827; State ex rel. Koeln v. St. Louis YMCA, 259 Mo. 233, 168 S. W. 589.

In the situation which you present, it is apparent that the property in question is not being used for religious, educational or charitable purposes. That it is not presently being used for some other purpose is of no consequence; the statute requires that property to be exempted must be "actually and regularly used" for one or more of the stated purposes.

Even if the question were to be considered from the point of view of the intended use of the property, our conclusion remains unchanged. From the facts submitted it is clear that the owners are hopeful of inducing private parties to use the tract for a profit-making enterprise, which, of course, is not an exempt use. Although any proceeds received by the Chamber of Commerce from the sale or lease of the property are to be used for educational or charitable purposes, the exception contained in the above-quoted statute specifically eliminates this fact as a consideration in determining the tax exempt status of property.



Honorable Robert A. Bonney

For the reasons stated, it is our opinion that the property of which you inquire is not exempt from taxation under Section 137.100, RSMo 1959.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JJM lc

NOT FOR PROFIT CORPORATIONS:  
CORPORATIONS:  
SECRETARY OF STATE:  
NAMES:  
DISCRETION:

It is the opinion of this office that in a case wherein the Secretary of State determines that the requested name of a Not For Profit Corporation is one so similar to a name previously on file in his office so as to mislead or deceive the general public or persons dealing with the corporation, he may refuse to file such name.

February 28, 1963

Opinion No. 22

Honorable Warren E. Hearnest  
Secretary of State  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Hearnest:

This will acknowledge receipt of your recent letter requesting an opinion of this office. Your request reads as follows:

"This department has recently been requested to determine whether or not one, or any of the following names, are available for use as the name of a Not For Profit Corporation under Chapter 355. The names presented are as follows:

1. St. Ferdinand Township Democratic Club.
2. St. Ferdinand Township Independent Democratic Club;
3. Independent Democratic Club of St. Ferdinand Township.

"We currently have on file with this office, and in good standing, a corporation formed under Chapter 355, under the name St. Ferdinand Township Regular Democratic Club.

"Section 355.035, paragraph (2) states that a corporate name-

'shall not be the same as the name of any corporation, whether for Profit or Not For Profit, existing under any law of the state---.'

Honorable Warren E. Hearnnes

"The problem involved, as this department sees it is, whether or not the name of a corporation presently on file with this office precludes use of the names, or one of them, presented to this office, which in turn hinges upon the interpretation of the word 'same' in 355.035.

"We would appreciate your opinion in this matter so that the problem might be resolved in this case, and future cases to come before this office."

In reply to your question we agree with your observation that the solution to the question presented depends upon the meaning of the word "same" as used in Section 355.035, RSMo 1959.

The pertinent part of Section 355.035, RSMo 1959, reads as follows:

"The corporate name \* \* \*

"(2) Shall not be the same as the name of any corporation, whether for profit or not for profit, existing under any law of this state, or any foreign corporation, whether for profit or not for profit, authorized to transact its business or conduct its affairs in this state, and \* \* \*"

It will be noted that the above statute uses the term "shall not be the same as the name of any corporation . . . ." while our General and Business Corporations Act, Chapter 351, RSMo 1959, in Section 351.110 regulating names of corporations uses entirely different language as follows:

"The corporate name \* \* \*

"(3) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter."

Honorable Warren E. Hearnes

As may be seen there is a great difference between the two statutes, the older Section 351.110, RSMo 1959, using the term "or deceptively similar to" while our newer Section 355.035, RSMo 1959, uses the language "shall not be the same as . . . ." There are many cases construing the meaning of the older Section 351.110, RSMo 1959, among them the following: *Empire Trust Co. v. Empire Finance Co.*, 41 S.W.2d 847. These cases all turn upon the "or deceptively similar" portion of 351.110, RSMo 1959. It may be pointed out that there are no cases construing the meaning of Paragraph 2 of Section 355.035, RSMo 1959.

While it may have been better had our legislature in enacting Section 355.035, RSMo 1959, used the same terminology as Section 351.110, RSMo 1959, it chose, either by design or otherwise, to use different language and by so doing has given general Not For Profit corporations greater leeway in choosing a name.

While, as stated supra, there are no cases construing Paragraph 2, Section 355.035, RSMo 1959, it is substantially the same statute as previously enacted by the State of Illinois in 1943, which statute was taken substantially from an earlier Illinois Statute. There are only two cases noted in connection with this Illinois statute which must be given consideration in this matter. They are: *People ex rel. Felter v. Rose*, (1907) 225 Ill. 496, 80 NE 293, 294; and *International Committee of the Young Women's Christian Association v. Young Women's Christian Association of Chicago*, (1902) 194 Ill. 194, 62 NE 551. It should be noted that in neither of the above cases did the court rule directly upon the statute involved, but it is believed that they apply to the question under consideration.

The Young Women's Christian Association case, supra, involved an injunction filed by the Young Women's Christian Association of Chicago [the older association] against the International Committee of the Young Women's Christian Association. The court, ruling for the Young Women's Christian Association of Chicago, stated that the defendant would be enjoined from using the name International Committee of the Young Women's Christian Association because of its similarity to the plaintiff's name. That it would confuse the general public and cause them to direct donations to it which were meant for the plaintiff organization. That it was a name

Honorable Warren E. Hearnes

calculated to deceive and mislead. Therefore, they would not be allowed to profit from it.

The Rose case, supra, was a mandamus action brought against the Secretary of State of Illinois in an attempt to force him to file a corporate name which he had refused to file because of its similarity to a name of a corporation already authorized to do business in Illinois. The Supreme Court of Illinois, ruling for the Secretary of State, stated they would not compel him to perform what might well be a vain act. That the names in question were so similar that in a proper case they [the court] might be compelled to enjoin the use of the requested name. The essence of the opinion is stated as follows, l.c. 294:

"If this mandamus is awarded this court might be put in the absurd position of being required to sustain an injunction against the use of the name which it has compelled the Secretary of State, by mandamus, to authorize. The Secretary of State will not be required, by mandamus issuing out of this court, to issue a certificate of incorporation when it is plainly apparent that the effect will be to mislead the public dealing with such corporation." (Emphasis supplied)

So, while the court did not construe the statute specifically, they intimate from the above language that the Secretary of State may have some portion or measure of discretion in the filing of names of Not For Profit Corporations.

Thus, in the question before us, it does not seem conceivable that our legislature [even in the face of the difference in language of Sections 351.110 and 355.035, RSMo 1959] would have intended to permit the organization of a Not For Profit Corporation with a name deceptively similar to that of another existing corporation or one that could be so calculated to deceive and mislead the general public or persons dealing with the corporation.

Honorable Warren E. Hearnes

CONCLUSION

It is the opinion of this office that in a case wherein the Secretary of State determines that the requested name of a Not For Profit Corporation is one so similar to a name previously on file in his office so as to mislead or deceive the general public or persons dealing with the corporation, he may refuse to file such name.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Northcutt.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

RRN:im:lt



OPINION REQUEST NO. 303  
ANSWERED BY LETTER  
(Kingsland)

-1962

#24(1963)

February 5, 1963

Honorable Edgar J. Keating  
Home Savings Building  
1006 Grand Avenue  
Kansas City, Missouri



Dear Senator Keating:

This is in answer to your letter dated August 2, 1962 involving the construction of a previous Attorney General's opinion dated April 25, 1946 which concluded that Series E bonds issued to two persons in co-ownership form are not taxable "unless purchased in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the purchaser".

As the facts in that opinion request were limited to "co-ownership" the opinion dealt only with that type of ownership and not with the beneficiary form of ownership.

The 1946 opinion referred to in your letter was written prior to the decisions of the Missouri Supreme Court in the cases of *In re Gerling's Estate* (1957), 303 SW 2d 915; and *Osterloh v. Carpenter* (1960), 337 SW 2d 942. The Gerling case, supra, held that there was no transfer of property subject to inheritance tax on the death of a joint tenant. The subsequently decided Osterloh case, supra, held that there was no transfer of property subject to inheritance tax upon the creation of a joint tenancy even though within the statutory two year period before decedent's death so as to create a statutory presumption that it was in contemplation of death. The effect of these two decisions was to effectively remove jointly held property from Missouri inheritance tax.

Under the authority of these two cases the only question presented with Series E savings bonds is whether the "co-ownership" of these bonds is the legal equivalent of "joint ownership".

Honorable Edgar J. Keating

If so, the Osterloh and Gerling cases, supra, would be controlling and the bonds would not form part of the taxable estate.

In the case of Valentine v. St. Louis Union Trust Company (1952), 250 SW 2d 167, the Supreme Court of Missouri construed the effect of co-ownership of United States savings bonds, and noted, l. c. 169:

"The Treasury regulation pertaining to co-ownership of United States savings bonds, with respect to such co-owners, creates a joint tenancy with right of survivorship."

This being so, these bonds are not taxable as part of decedent's estate as they are in effect jointly held property and therefore come within the rule as announced in the Osterloh and Gerling cases, supra.

In any event, as stated in your letter this co-ownership estate was established more than two years prior to decedent's death and therefore was not made in contemplation of death as defined in our inheritance tax statutes.

It is, therefore, the conclusion of this office that United States savings bonds, held in co-ownership, are not taxable on the death of a co-owner. It is further the opinion of this office that the Attorney General's opinion dated April 25, 1946, is no longer controlling and is therefore withdrawn.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

RDK:MM

ESCHEAT: The County Collector may not sell for delinquent  
REAL PROPERTY: taxes land which has escheated to the State in  
accordance with Section 470.010 RSMo 1959. Title  
to such property vests in the State immediately  
upon the death of the former owner and Section  
470.060 et seq. merely outlines the formal pro-  
cedure necessary to secure a judicial determination  
that the title has in fact vested.

Opinion No. 313 (Denman)

January 30, 1963

# 26 (1963)

Honorable Harold L. Henry  
Prosecuting Attorney  
Howell County  
West Plains, Missouri



Dear Mr. Henry:

This letter is in response to your letter of August 18,  
1962, requesting an opinion of this office upon the follow-  
ing matter:

"A matter has come up down here in this  
County concerning some delinquent tax  
land that has escheated to the State of  
Missouri. This real property was owned  
by a party who died on January 11, 1959,  
leaving no heirs and it escheated to the  
State of Missouri under order of the  
Probate Court. On January 1, 1960, the  
taxes on the property for the year of  
1959 became delinquent, and there has  
been a delinquency for each year there-  
after. The County Collector has, there-  
fore, in view of the three year delin-  
quency of the payment of these taxes  
advertised this land for sale under the  
regular delinquent tax sales statutes.  
In view of the provisions of Chapter 470  
R.S. Mo., 1959, and especially in Sections  
470.040 and 470.170 thereof, I question  
whether or not the purchaser at such a  
sale could obtain title thereto. The  
specific question, as I see it, is whether  
or not lands that have escheated to the  
State of Missouri and on which the taxes

Honorable Harold L. Henry

become delinquent, can be sold by the County Collector at a delinquent tax sale.

"This sale has been advertised for August 27, 1962, and I would appreciate a memorandum or an opinion from your office on this question."

Section 470.010, RSMo 1959, provides in part as follows:

"If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; \* \* \* such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of sections 470.010 to 470.260."

Section 470.060, et seq., proscribes the procedure by which the prosecuting attorney of the county in which the real estate is situate shall secure a judicial determination of title to such property.

All real and personal property belonging to the State is exempted from taxation by general law. Article X, Section 6, Constitution of Missouri, 1945; Section 137.100, RSMo 1959. Taxes levied and assessed against a tract of land while under private ownership cannot be collected after such land has been acquired by a governmental agency. State vs. Bauman, 1941, Mo., 153 SW2d 31. Your question turns upon when the land vests in the State. If it escheats and vests in the State immediately upon the death of the former owner, it may not be sold for taxes accruing either prior or subsequent to his death. However, if the land does not vest in the State until there has been a judicial determination thereof, it may be sold for delinquent taxes prior to the filing of information to secure such a determination.

In an opinion of this office issued on August 11, 1942, to the Honorable F. M. Brady, Prosecuting Attorney of Benton County, Missouri, this office concluded that under Section 470.010, real property formerly owned by a decedent who leaves

Honorable Harold L. Henry

no heirs capable of inheriting vests in the State immediately. The procedure to secure title thereto merely outlines the means of securing a judicial determination that the title has in fact vested. This opinion was modified by an opinion of this office issued on July 12, 1943, to the Honorable Forrest Smith of the Board of Fund Commissioners. However, the conclusion reached in the earlier opinion pertinent to your question was not changed or modified. A copy of both of these opinions is enclosed herein.

We can find no Missouri cases that have as yet passed directly on this point. In *State vs. Buchanan*, 1948, Mo., 210 SW2d 359, the Court held that where the State was not a party to the proceedings, the probate court had no jurisdiction to determine title to certain land in dispute between the State and alleged heirs of the deceased former owner. The Court intimated that escheat land vested immediately, saying (1. c. 362):

"Upon the death of the deceased, the legal title to the real estate descended to and vested in the heirs at law of the deceased, 'subject to the payment of his debts, etc.' \* \* \* If there were no heirs or representatives capable of inheriting the described real estate, it escheated and title vested in the state, subject to and in accordance with the provisions of Art. 1 of Chap. 3, Sec. 620, et seq., R.S. 1939, Mo.R.S.A. \* \* \*"

Courts in other jurisdictions have differed as to the necessity for a judicial proceeding to establish an escheat and vest the land in the State. 30 C.J.S., Escheat, Section 19b(2), page 1184. However, recent decisions hold that on the death of a citizen intestate and without heirs, the title to his property vests in the State immediately upon his death. 23 A.L.R. 1237. In the annotated case, *Re Melrose Ave.*, 234 N.Y. 48, 136 N.E. 235, 23 A.L.R. 1233, and other cases annotated thereunder and in the supplemental annotation in 79 A.L.R. 1364, the courts held that land vested immediately upon the death of the former owner dying intestate and without heirs and could not legally be sold for non-payment of taxes. *Puckett vs. State*, 1853, Tenn., 1 Sneed 355; *State vs. Goldberg*, 1904, 113 Tenn. 298, 86 S.W. 717; *Hanna vs. State*, 1892, 84 Texas 664, 19 SW 1008; *Arizona Land & Stock Co. vs. Markus*, 1931, 37 Ariz. 530, 296 P. 251; *Schmitz vs. New Mexico State Tax Commission*, 1951, 55 N. Mex. 320, 232 P.2d 986.

Honorable Harold L. Henry

CONCLUSION

It is the opinion of this office that the county collector may not sell for delinquent taxes land which has escheated to the State in accordance with Section 470.010, RSMo 1959. Title to such property vests in the State immediately upon the death of the former owner and Section 470.060 et seq. merely outlines the formal procedure necessary to secure a judicial determination that the title has in fact vested.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JHD:sr

Enclosures - 2



CREDIT UNIONS: Missouri credit unions are authorized to invest their funds in bonds of school districts.

OPINION No. 27 [1963]

January 24, 1963



Honorable R. B. Mackey  
Acting Commissioner of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Mackey:

This opinion is rendered in reply to a request over the signature of I. W. Whitson, Supervisor of Credit Unions, such request reading, in part, as follows:

"May a Missouri State Chartered Credit Union invest in bonds issued by school districts in Missouri."

A Missouri credit union's power to invest its funds is found in the following language from Section 370.070 RSMo 1959:

"A credit union shall have the following powers:

\* \* \* \* \*

(3) It may invest, through its board of directors, in the bonds of the United States, or of any state thereof or of any municipality, the bonds of which municipality are legal investments for savings banks in the state of Missouri and in the shares of credit unions to which it is eligible to memberships. \* \* \*

Language quoted from subparagraph (3) of Section 370.070 RSMo 1959, supra, makes no mention of bonds of a school

Honorable R. B. Mackey

district as a lawful investment for credit unions but it does refer to bonds of any municipality which are legal investments for savings banks of Missouri, and sanctions the same as proper investments for credit unions.

At this point we are confronted with the fact that House Bill No. 102, passed by the 70th General Assembly of Missouri, Laws of Missouri, 1959, effected an outright repeal of Chapter 364 RSMo 1949, as amended, entitled "Savings Banks And Safe Deposit Institutions." We are thus faced with construing a statute, Section 370.070 RSMo 1959, which incorporates, by general reference, certain provisions of Section 364.070 RSMo 1949, which were repealed in 1959.

In order that we may have before us the pertinent provisions of Section 364.070 RSMo 1949, now expressly repealed, we quote pertinent provisions from such statute as follows:

"All sums so received, except those held as bailee for safekeeping and storage only, and the income derived therefrom, and all moneys entrusted to any such corporation, by order of court or other lawful authority, shall be invested only as follows:

\* \* \* \* \*

(4) In bonds of any city, county, town, township or school district of this state that has not defaulted in the payment of any part of either principal or interest thereof, within five years previous to making such investment; and provided, such bonded debt does not exceed five per cent; \* \* \*

The first issue which presents itself for determination is: Did the Legislature by repealing Chapter 364 in its entirety intend to eliminate as legitimate invest-

Honorable R. B. Mackey

ments by credit unions "the bonds of . . . . any municipality . . . " which bonds "are legal investments for savings banks?" In the premises, we believe that all that can be inferred from repeal of Chapter 364 is a legislative intent to do away with savings banks and not to inhibit investment practices of credit unions.

We are aware of the cases which have held that in order for a statute, which adopts another, to survive the repeal of the adopted statute, the adoption must be by specific descriptive reference. *State v. Williams* (Mo. Sup., 1911), 140 S. W. 894; *Gaston v. Lamkin* (Mo. Sup., 1893), 21 S. W. 1100. However, we are also cognizant of the principle that "the basic rule of construction of an ordinance or statute is to first seek the lawmakers' intention, and if possible to effectuate that intention." *Laclede Gas Co. v. City of St. Louis* (Mo. Sup., 1953), 253 S. W. 2d 832, 835. Moreover, we also have the rule that "The repeal of a statute by implication is a matter of legislative intent, is not presumed and is not favored." *State v. Oswald* (Mo. Sup., 1957), 306 S. W. 2d 559, 562.

Applying these latter rules to the instant case, we must conclude that the repeal of Chapter 364 cannot be regarded as impliedly repealing so much of Section 370.070 as authorizes credit unions to invest in municipal bonds. It is obvious from a reading of Section 370.070 that the legislature intended credit unions to have such power limited only by the qualification that these bonds must be of the type in which savings banks could invest. It cannot be reasonably said that the elimination of the qualification as a result of the elimination of savings banks must be regarded as a revocation of the authority granted to credit unions by Section 370.070.

The general rule is stated in 82 C.J.S., Statutes, Section 370, page 847, thusly:

"As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and, therefore, is not affected by any subsequent modifica-

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tion of the statute adopted unless  
an intention to the contrary is  
clearly manifested; \* \* \*

In *Devery v. Webb* (Idaho Sup., 1937), 70 P. 2d 377, a situation analogous to the instant case arose when a statute governing the organization of highway districts was repealed. The statute which sets out the procedure for dissolving such a district, I.C.A. Section 39-1582, provided, in part, that a highway district could be dissolved when a petition was signed by "a majority of the persons possessing the qualifications necessary to sign a petition for the organizing of such highway district . . . ."

Since the repeal of the organizing statute eliminated the concept of a person who possessed the "qualifications necessary to sign a petition for the organizing of such highway district . . . .," the argument was made that the repeal of the organizing section, I.C. 379, "destroyed the means whereby highway districts might be disorganized."

In rejecting this contention, the court said, I. C. 379:

"[3,4]. Where a specific provision or direction of a statute is referred to and adopted by a subsequent enactment, the repeal of the former statute does not work a repeal of the specific portion thereof adopted in the latter, so far as the same is requisite or applicable to the operation and enforcement of the subsequent statute."

In the instant case, we adopt the view that credit unions may still invest in municipal bonds and that the type of municipal bonds in which they may invest are those set out in the now repealed Section 364.070 RSMo 1949.

Having so held, it is necessary to determine whether a school district is a "municipality" as that term is used in Section 370.070. Perhaps, the clearest guide to the meaning of that term is the series of words

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which appear in the statute it adopts by reference. Section 364.070(4) RSMo 1949, permitted savings banks to invest in "bonds of any city, county, town, township or school district . . ." It would certainly appear that the legislative intent in the use of the word "municipality" in Section 370.070 was that the word should be regarded as embracing all the specific terms appearing in Section 364.070(4). The only alternative to such a holding would be that the Legislature meant to exclude some and include others, without specifying which category each was to fall into. At best, such a conclusion is highly unlikely.

Moreover, it is clear that the term "municipality" encompasses far more than the classic concept of a city. In holding that the St. Louis Housing Authority is a municipality, our Supreme Court said in *St. Louis Housing Authority v. City of St. Louis* (1951), 239 S. W. 2d 289, 294-295:

"Municipality now has a broader meaning than 'city' or 'town,' and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. 42 C.J. p.1413; 61 C.J.S., Municipal, page 945; *Curry v. Sioux City Dist. Tp.*, 62 Iowa, 102, 17 N.W. 191. But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, 'municipal corporation,' in the broader sense now includes public corporations created to perform an essential public service and 'is applied to any public local corporation exercising some function of government.' 'Municipal corporation' now also includes a corporation created principally as an instrumentality of the state but not for the pur-

Honorable R. B. Mackey

pose of regulating the internal  
local and special affairs of a  
compact community."

See, also, Russell v. Frank (1941), 348 Mo. 533, 154 S.W. 2d 63, in which a Missouri school district was held to be a municipality, and Laret Investment Co. v. Dickmann (1939), 345 Mo. 449, 134 S. W. 2d 65, in which the Supreme Court discusses the broad application of the term "municipality."

Under some circumstances, the term "municipality" possibly would not include a school district. However, under the facts of this case, we believe that the term "municipality" in the adopting statute was meant to include all of the specific terms used in the adopted statute.

#### CONCLUSION

It is, therefore, the opinion of this office that credit unions organized in Missouri may invest their funds in bonds of school districts which otherwise qualify under the terms of the now repealed Section 364.070 RSMo 1949.

This opinion, which I hereby approve, was prepared by my assistant Albert J. Stephan, Jr.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

AJS lc



OPERATOR'S LICENSE:  
MOTOR VEHICLES:  
DRIVER'S LICENSE:

Wife and minor children of a person in military service stationed in Missouri who have a valid operator's license of the state of his residence are not required to obtain an operator's license from this state.

January 24, 1963

Opinion No. 344 - 62  
30 - 63



Honorable Arthur B. Cohn  
Prosecuting Attorney  
Pulaski County  
Waynesville, Missouri

Dear Mr. Cohn:

In your letter of recent date, you requested an opinion from this office in the following language:

"Would you please furnish me with an opinion in regard to the following situation:

"No. 1 Section 302.020 makes it unlawful for any person to drive as an operator or chauffeur any vehicle upon the highways of the State of Missouri without a valid operator's license or chauffeur's license, issued by the State of Missouri.

"No. 2 Section 302.080 exempts from this law non-residents of the State of Missouri.

"Facts: A wife, son, daughter, or other dependent of a military man stationed at a military base in the State of Missouri has a valid operator's license from a sister state. The military man is a non-resident of the State of Missouri, with his home in a sister state, but the military man and the dependents physically reside in the State of Missouri.

"Question: Does the Law of the State of Missouri require the dependents of the military man to have a Missouri operator's or chauffeur's license while in the State of Missouri notwithstanding that the dependent has a valid license from a sister state which is the home of the military man."

In your letter you state that the person you have in mind is a nonresident of Missouri with a home in a sister state and is serving in military service in this state. You further state that his wife, daughter and other dependent are physically present in this state. You do not state the relationship of the dependent so this opinion will be restricted to the wife and minor children and the law as it applies to them.

Section 302.020, RSMo 1959, makes it unlawful for any person to drive a motor vehicle upon any highway of this state unless he has a valid license as an operator of a motor vehicle as required by Chapter 302, RSMo 1959.

Section 302.030, RSMo 1959, exempts certain persons from the provisions of this chapter as follows:

"(2) A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator."

Section 302.010, RSMo 1959, defines a nonresident as follows:

"'Nonresident', every person who is not a resident of this state;"

It must be noticed that under Section 302.030 that a nonresident of the state who has in his immediate possession a valid operator's license issued to him by the state of his residence is not required to have an operator's license issued by this state. Therefore, the answer to your questions will depend upon the determination of residence of the persons in question.

Ordinarily, the residence of a person in military service remains unchanged when he enters service. This is so because he acts under military orders and not of his own volition. *Oliver v. Oliver*, 325 S.W.2d 33.

At common law and in this state, a wife's domicile is that of her husband during cohabitation. *Hairs v. Hairs*, 300 S.W. 540, 222 Mo. App. 941; *Phelps v. Phelps*, 246 S.W.2d 838. Under these decisions the residence of the wife would be the same as that of her husband. Since her husband is a resident of another state, she likewise is a resident of the same state and as long as she has a valid operator's license issued to her by that state it is not necessary for her to have one from this state.

Ordinarily, the domicile or legal residence of a minor child is the same as that of the father unless the parents of the children are separated and then the child takes the domicile of the parent with whom it lives. *Beckman v. Beckman*, 218 S.W.2d 566, 358 Mo. 1029. Under the facts that you have submitted the minor children of the man in military service would have the same residence as that of their father and they are likewise nonresidents of Missouri. If the minor children are at least 16 years of age and have in their possession a valid operator's license issued by the state of residence of their father, it is not necessary for them to have an operator's license issued by this state although they are physically present and living in this state.

#### CONCLUSION

The wife and minor children 16 years of age or older of a nonresident man serving in the military service and who are living in Missouri while he is stationed in Missouri and who have valid motor vehicle operator's licenses issued to them by the state of his residence do not have to obtain an operator's license from this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

Opinion No. 363 - 1962, 32 - 1963  
Answered by Letter (O'Malley)



January 16, 1963

Honorable Charles G. Hyder  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Mr. Hyder:

This office is in receipt of your letter of January 12, 1963 with reference to the request of your predecessor in office, Mr. Raymond A. Roberts, for an official opinion touching the authority of the county collector of St. Francois County to employ certain collection procedures. Mr. Roberts' request is here quoted:

"It is our understanding that several counties in Missouri have arrangements whereby county real estate and personal property taxes may be paid by the taxpayers at local banks within the county, and the County Collector subsequently mails a receipt for the payment of such taxes.

"Our County Collector is anxious to set up such a procedure in St. Francois County so that he may utilize a bank in Bonne Terre in the north end of the County, in Flat River in the central part of the county, in Bismarck and Leadwood in the west end of the county, as well as the Collector's office in the south end of the county, for the convenience of the taxpayers.

"Our question is, one, may the County Collector utilize banks as collection points for county taxes. Two, if so; A. What sort of depository agreement should be entered with the bank so utilized. B. What sort of pledge of security should be given by the bank. C. What method of receipting payment of taxes should be filed."

In your letter of January 12, 1963, you stated that the question posed by Mr. Roberts was of continuing interest to you, but you have not indicated, as requested of you by phone a few days ago, whether the county court of St. Francois County has entered an order of record requiring the county collector to make daily deposits in depositories selected by the county court as authorized by paragraph 2 of Section 52.020 RSMo Cum. Supp. 1961. This could be an important factor in determining whether the desired collection procedures may be employed. Furthermore, Mr. Roberts' inquiry does not ask this office to construe any particular statute in order to measure the powers of the county collector in relation thereto. In view of such facts this letter of advice is submitted in lieu of a formal opinion requested by you and Mr. Roberts.

We first direct attention to that portion of Section 52.020 RSMo Cum. Supp. 1961, disclosing how the county collector's official bond is to be conditioned, such statute providing, in part, as follows:

"The bond shall be conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years constituting his term of office, and that he will in all things faithfully perform all the duties of the office of collector according to law."

Paragraphs 2 and 3, Section 52.020 RSMo Cum. Supp. 1961, provide as follows:

"2. In all third and fourth class counties the county court may require the county collector to deposit daily all collections of money in the depositories selected by the county court in accordance with the provisions of sections 110.130



to 110.150 RSMo, to the credit of a fund to be known as 'County Collector Fund'. The depositaries are bound to account for the moneys in the county collector's fund in the same manner as the public funds of every kind and description going into the hands of the county treasurer and shall provide security for the deposits in the manner required by section 110.010, RSMo. If daily deposits are required to be made, the county courts may also require that the bond of the county collector shall be in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding his election or appointment, plus ten per cent of the amount. No county collector shall be required to make daily deposits for days when his collections do not total at least one hundred dollars.

"3. The collector shall not check on the county collector's fund except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositaries."

If the county court of St. Francois County has made an order requiring the county collector to make daily deposits as authorized by paragraphs 2 and 3 of Section 52.020 RSMo Cum. Supp. 1961, cited above, it is obvious that such county collector may not utilize banks of his own choice throughout St. Francois County in which to place collections made by him. If no such order has been made by the county court it would seem that the county collector would be charged with a primary duty as set forth in the following language from Section 139.210 RSMo 1959:

"1. Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commission, into the county treasuries and to the director of revenue."



Until such time as the county collector turns over his collections as may be directed under Section 52.020 RSMo Cum. Supp. 1961, or as directed by Section 139.210 RSMo 1959, both statutes cited above, he will hold such collections as an insurer under the rule as stated in City of Fayette v. Silvey, 290 S.W. 1019, 1.c. 1021:

"The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession."

A careful search has been made of Chapter 52 and 139 RSMo 1959, as amended, and nowhere have we found any authority vested in the county collector to select depositories in which he may place his collections prior to the time he makes his settlements and turns over such funds as required by Section 139.210 RSMo 1959, and thereby relieve himself as an insurer of said funds. If the county collector desires to meet taxpayers at various points in the county and collect their taxes as authorized by Section 139.010 RSMo 1959 his authority to render such service is spelled out in that statute. And unless the county court requires the county collector to make daily deposits of his collections under Section 52.020 RSMo Cum. Supp. 1961, cited supra, we find no statute requiring that he deposit his collections in any specific place of safe-keeping pending his turnover of the same each month as required by Section 139.210 RSMo 1959.

Until such time as you can point to specific statutory authorization allowing the county collector of St. Francois County to utilize various banks in the county as collection points for county taxes and cause such banks to enter into depositary agreements with the collector, we must say that such authority does not exist under the following language from Lamar Township v. City of Lamar, 169 S.W. 12, 261 Mo. 171, 1.c. 189:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that

they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

We are enclosing a copy of an opinion of this office dated December 27, 1954, addressed to Honorable J. A. Rouveyrol, Commissioner of Finance, construing Missouri's depository law found at Chapter 110 RSMo 1949. Some minor changes have been made in the law since the opinion was written, but the principles of law stated therein are still applicable.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JLO'M:lt  
Enc.

OPINION NO. 397 (1962)  
NO. 35 (1963)

ANSWERED BY LETTER

April 12, 1963



Honorable R. B. Mackey  
Commissioner of Finance  
Division of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Mackey:

This letter is in response to your letter of October 29, 1962, with enclosures, requesting an opinion concerning bank loan limits and collateral securities therefor.

1. In an opinion of this department to D. R. Harrison dated January 22, 1943, a copy of which is attached hereto, this office concluded that loans secured by United States Government bonds were not exempt from the loan limits prescribed for banks.

2. We have reconsidered this question and find no reason to differ from the conclusion reached in that opinion.

3. It is further our view that, on the same basis, loans secured by FHA and GI loans are not exempt from the loan limits.

4. We understand that there is legislation pending before the Legislature which may amend the applicable statutes respecting this problem.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JGS:ml  
Enc.

January 7, 1963



Honorable John M. Dalton  
Governor, State of Missouri  
Executive Office  
Jefferson City, Missouri

Dear Governor Dalton:

You have requested that this office provide you with a memorandum setting forth our opinion as to whether Judge Emory E. Smith is qualified for appointment as special commissioner under the provisions of Sections 476.450 to 476.570, inclusive, RSMo 1959.

You have informed us that in January, 1949, Judge Smith was convicted in the United States District Court for the Western District of Missouri of the crime of willfully evading payment of a federal income tax, a felony under the provisions of Title 26, U.S.C.A., §145(b).

Section 476.450 provides that certain judges who have ceased to hold such office "shall if they so elect, be made, constituted and appointed" special commissioners or referees.

Section 476.500 provides that any person who desires to accept the provisions of the law shall notify the governor in writing of such fact, "and if he be qualified the governor shall certify such fact to the comptroller and state auditor and to the chief justice of the supreme court."

Under the facts submitted in your request, Judge Smith has served more than twelve years as Judge of the Circuit Court and is more than 65 years of age. He has notified you, as Governor, in writing of his desire to accept the provisions of the law and to be appointed as special commissioner or referee. Hence, unless his conviction of the federal offense

above mentioned disqualifies him, he would be eligible for such appointment.

Section 476.480 RSMo 1959 provides as follows:

"Sections 476.450 to 476.510 shall not apply to any person who has been convicted of a felony in any court or who has been impeached or removed from office for misconduct."

In our opinion, Judge Smith is disqualified by the plain and unambiguous provisions of Section 476.480. That section expressly provides that the law shall not apply to any person who has been convicted of a felony in any court. Judge Smith has been "convicted of a felony" in a United States District Court in Missouri. However, it is urged on his behalf that Section 476.480 should apply only if the conviction was in a court of this State or alternatively, only if the offense of which he was convicted is defined to be a felony by the laws of this State. To construe the statute in accord with either of these contentions would, in our view, be inconsistent with the plain language of Section 476.480, as well as with its obvious intent and purpose.

The disqualification results from a conviction of a felony in any court. The word "any" is broad and all-inclusive. In Hamilton Fire Insurance Company v. Cervantes, Mo.App., 278 SW2d 20, 1. c. 24, the Court stated:

"\* \* \* The word 'any' is all-comprehensive and the equivalent of the words 'every,' State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S.W.2d 785, and cases cited 228 S.W.2d 788, and 'all.' \* \* \*"

In Adams v. Maryland, 347 U.S. 179, 98 L.Ed. 608, the Supreme Court of the United States said with reference to a federal Act forbidding use of certain testimony "in any criminal proceeding . . . in any court" : "Language could be no plainer." We agree.

The United States District Court for the Western District of Missouri is clearly a court comprehended within the phrase "any court" and the offense of which Judge Smith was convicted is a "felony" in the court in which such conviction was had.



Arguments similar to those advanced on behalf of Judge Smith were considered and ruled adversely by our Supreme Court in State ex rel Barrett v. Sartorius, 351 Mo. 1237, 175 SW2d 787. Under the statutory provisions there for construction, a person convicted of a felony was deprived of the right to vote unless granted a full pardon. The Court held that the statute disqualified from voting a person who had been convicted of the offense of attempting to evade payment of federal income taxes, a felony under the laws of the United States. In ruling that such person was disqualified, the Court stated that "anyone convicted for felony under United States law is excluded from the right of voting in this State."

A minority of the Court, concurring in the result of the Sartorius case, agreed that the disqualification was not limited to convictions in Missouri courts of felonies under the laws of Missouri and committed in Missouri. The minority took the further position that the statute there in question should be construed to disqualify the voter only if he was convicted of a felony in this State or of a felony in another jurisdiction which would also be a felony if the crime had been committed in Missouri. Note was taken of the fact that evasion of payment of state income tax in Missouri is only a misdemeanor. However, the majority of the Court refused to accept any such limitation. The Court quoted and adopted from the North Dakota case of State ex rel Olson v. Langer, 65 N.D. 68, 256 NW 377, the holding that it is sufficient that the act constitute a felony in the jurisdiction in which it was committed.

The Sartorius case rules the qualifications of a voter. The Court pointed out that provisions of the kind in question "are for the protection of the public by permitting only those who have lived up to certain minimum moral and legal standards (by not committing a crime classed as a felony) to exercise the high privilege of participating in government by voting."

The Sartorius case has been cited as authority in State v. Hermann, Mo.Sup., 283 SW2d 617, which involved the qualifications of a juror, the statute providing that no person "who has been convicted of a felony" shall be permitted to serve as such. With respect to the Sartorius case, the Court stated:



"We hold that such broad language without any stated limitation disqualified from voting one who had been convicted of a felony in a federal court."

In the Hermann case, it was held, 283 SW2d 1. c. 622, that the juror having been convicted in a federal court of sending obscene letters through the mail, it "conclusively" appeared that such juror was disqualified.

There is much to be said for the view advocated by the minority in the Sartorius case as applicable to the right to vote. Our courts have held on several occasions that election laws must be liberally construed in aid of the right of suffrage. Nance v. Kearbey, 251 Mo. 374, 158 SW 629, 631; Application of Lawrence, 353 Mo. 1028, 185 SW2d 818, 820. However, considerations of such nature which might be relevant in construing the disqualification provisions of election laws are of little aid in ascertaining the legislative intent to be derived from the language employed in Section 476.480.

The compensation provided for in Section 476.450 is payable only to those qualified persons who have elected to be made, constituted and appointed special commissioners or referees, and hence is not a mere gratuity. Such special commissioners or referees are subject to call for temporary duty in any court in the State to render such duties as may be directed by the Supreme Court or as may be prescribed by law. Section 476.460 RSMo 1959. These special commissioners constitute a part of our judicial system and are directly concerned with the administration of justice by the courts of this State.

In several disbarment proceedings, our Supreme Court has held that the offense of which Judge Smith was convicted involves moral turpitude. See In re Canzoneri, Mo. Sup., 334 SW2d 30, 33. Article VII, Section 1, Constitution of Missouri 1945, provides in part that judges of the circuit court shall be liable to impeachment for "any offense involving moral turpitude."

In view of the foregoing, we cannot attribute to the General Assembly an intent to limit the application of the general language used in this section in order to permit persons convicted of crimes of this nature to serve in a judicial capacity. The statute was enacted in 1951, long after the Sartorius case was decided, and it is to be assumed that the Legislature was aware of the broad construction adopted by the

January 7, 1963

Supreme Court in the Sartorius case, and believed that it would be equally applicable to the more specific language employed in Section 476.480, "convicted of a felony in any court." Had the Legislature intended to limit the application of the broad language of this section and adopt the view expressed in the concurring opinion in the Sartorius case, it could have readily done so, just as was done in the Habitual Criminal Act, Section 556.290 RSMo 1959.

In our opinion, the language of Section 476.480 was chosen for the very purpose and intent of including as a disqualification any felony conviction such as that of which Judge Smith was convicted. The provisions of this section do not constitute a penalty, retroactive or otherwise. See State ex rel Olson v. Langer, 65 N.D. 68, 256 NW 377, quoted with approval in the Sartorius case, 175 SW2d 1. c. 900. They merely provide a means of protecting the public and maintaining unblemished and free from any suspicion the judicial system of the State.

It is the opinion of this office that a conviction of the crime of willfully evading federal income taxes, a felony under the applicable federal law, disqualifies an otherwise eligible judge from the right to accept and be entitled to the benefits of Section 476.450 to 476.510, inclusive, RSMo 1959, and that a judge so convicted is not qualified for appointment as special commissioner pursuant to said statutes.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JN: sr

January 24, 1963



Honorable Gerald Kiser  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Mr. Kiser:

This is in response to the recent request of your predecessor for an opinion of this office as to whether special road and bridge tax money may properly be spent to improve and repair streets in incorporated areas of Clay County.

We note that Section 137.555, RSMo 1959, provides in part,

" . . . that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

In an opinion issued to the Honorable E. Wayne Collinson, dated April 9, 1949, a copy of which is attached herewith, the following was stated as part of the conclusion:

"It is the opinion of this department that the county court of Greene County may expend the monies derived from the special road and bridge tax authorized by section 8527, Laws of Missouri 1945, page 1478, derived

Honorable Richard E. McFadin

from property not situated in any special road district, and the one-fifth part retained by the county from taxes derived from property in a special road district to improve or repair any street in Springfield if such street forms a part of a continuous highway of Greene County leading through the city of Springfield."

The Section 8527 referred to in the foregoing quote is now known as Section 137.555, RSMo 1959.

We trust that the foregoing will fully answer your inquiry.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

AJS lc

1 enclosure

January 4, 1963



Honorable William W. Hoertel  
Prosecuting Attorney  
Phelps County  
Rolla, Missouri

Dear Mr. Hoertel:

This is in response to your request for an opinion from  
this office dated December 19, 1962, as follows:

"This is a formal request for an opinion  
concerning Section 454.120 R. S. Mo.,  
1959, said statute states as follows:  
'The Prosecuting Attorney upon the request  
of the Court or of State Division of  
Welfare shall represent the plaintiff in  
any proceedings under Section 454.010 to  
454.360.'

"My question, therefore, is whether or  
not this situation precludes a private  
attorney at law from representing a  
plaintiff in a Reciprocal Non-Support  
action, and if so, whether or not I, as  
Prosecuting Attorney, can force any  
prospective plaintiff to get the Court  
to request me to file a petition in Court  
for the said prospective plaintiff."

As a matter of general information, I am taking the  
liberty of enclosing herewith a prior opinion of this office  
dated September 10, 1962, to the Honorable Fred Steck,  
Prosecuting Attorney, Scott County, wherein you will note  
we advised that where the Prosecuting Attorney is requested  
by either the court or the State Division of Welfare to  
represent the plaintiff in proceedings under Chapter 454,  
RSMo 1959, he has the mandatory duty to do so.

Honorable William W. Hoertel

-2-

Further, in the same opinion we observed that the prosecuting attorney can in his discretion initiate a proceeding on his own initiative without awaiting an order of court or of the State Division of Welfare.

In reading the statutes, we find nothing which would preclude a plaintiff from hiring her own counsel to pursue her cause of action.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

HLM:BJ



Opinion Request #458 answered  
By Letter.

#56(1963)

January 3, 1963



Honorable L. F. Cottey  
Judge of the  
First Judicial Circuit  
Lancaster, Missouri

Dear Judge Cottey:

This is to acknowledge receipt of your letter of December 27, 1962, concerning the appointment of a juvenile officer for the First Judicial Circuit. You enclose a letter addressed to you dated December 27, 1962, from Edgar C. Padgett stating his qualifications for the position as juvenile officer, and you request advice from this office concerning these qualifications under Section 211.361, RSMo 1959.

Under Section 211.351 RSMo 1959, the circuit judge in circuits comprised of third and fourth class counties may appoint a juvenile officer to serve the judicial circuit. The qualifications of the person to be appointed as juvenile officer are as prescribed in Section 211.361, RSMo 1959. Under these statutory provisions, it is the responsibility of the circuit judge to determine whether an applicant meets the qualifications required by statute.

We think it is completely within the sound discretion of the court to determine whether an applicant, in lieu of certain academic training, "has had four years or more experience in social work with juveniles in probation or allied services." Thus, if a judge feels that an applicant has had four years experience in an "allied service," it would then be within his discretionary authority to make an appointment. In last analysis, the judge who is in a position to personally evaluate and analyze the applicant's background can best determine applicant's experience in "allied service."

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

TAXATION:  
ASSESSMENTS:  
AUTOMOBILES:  
PERSONAL PROPERTY:  
MOTOR VEHICLES:  
LEASED MOTOR VEHICLES:  
CORPORATIONS:

Motor vehicles situated or held in Livingston Co. which are owned by a domestic or foreign corporation doing business in this state or which are leased to a corporate lessee doing business in this state or which are leased to an individual residing in Livingston Co., are subject to assessment or taxation in Livingston Co. even though taxes have been paid on such motor vehicle in another state. Such motor vehicles are assessable in Livingston Co. to the corporate lessor doing business in this state or to the corporate lessee doing business in this state or the individual lessee residing in Livingston Co.

October 23, 1963

Honorable Don Chapman, Jr.  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

OPINION NO. 59

Dear Mr. Chapman:

This is in answer to your request for an official opinion which reads as follows:

"Several traveling salesmen who live in Livingston County have cars that are leased by them or their companies from leasing corporations outside of the State of Missouri. These particular cars display the license plate of the state where the leasing corporation is incorporated. We have been told that in most cases that Ad Valorem taxes are collected on these cars in the state where the leasing corporation is incorporated. Our County Court would like to know if these particular cars are assessable in Livingston County. I would appreciate an official opinion on this matter."



In answering your question, we first refer to the following statutes:

Section 137.075, RSMo 1959:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Honorable Don Chapman, Jr.

Section 137.080, RSMo 1959:

"Real estate and tangible personal property shall be assessed annually at the assessment which commences on the first day of January."

Section 137.090, RSMo, Cum. Supp. 1961:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except that houseboats, cabin cruisers and automobile trailer houses used for lodging shall be assessed in the county where they are located and tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction; provided, that no tangible personal property shall be simultaneously assessed in more than one county."

Section 137.095, RSMo 1959:

"The real and tangible personal property of all corporations operating in any county in the State of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed in the county in which the property is situated on the first day of January of the year for which the taxes are assessed, and every general or business corporation having or owning tangible personal property on the first day of January in each year, which is situated in any other county than the one in which the corporation is located, shall make return to the assessor of the county or township where the property is situated, in the same manner as other tangible personal property is required by law to be returned."

Honorable Don Chapman, Jr.

From your opinion request we understand that the salesmen who are the lessees of the automobiles reside in Livingston County and that the automobiles which are the subject of the lease are situated or garaged in Livingston County. This tax situs is important in determining the county in which the automobiles are to be assessed. Automobiles are tangible personal property. Section 137.090 provides that the property should be assessed in the county where the owner resides. Section 137.095 provides that the property of corporations operating in any county of the State of Missouri should be assessed in the county where the property is situated.

From these facts and from these statutes we must then conclude that if the automobiles are situated in Livingston County and are owned by a corporation operating in any county in the State of Missouri, the place where they should be assessed is in Livingston County. If the salesmen are deemed to be the owners or holders of the property for tax purposes, the county in which the automobiles should be assessed would, again, be Livingston County because the salesmen reside in Livingston County. Under either situation the county in which the assessment should be made would be in Livingston County.

In determining whether the tax could be assessed against the salesmen who are the lessees of the automobiles, we refer you to Section 137.075, supra. That section makes every person owning or holding tangible personal property liable for taxes thereon. Thus, the salesmen who are the lessees would be liable for the taxes if it is determined that they are the holders of the automobiles within the meaning of that statute.

In determining that the lessee is the holder of the automobile within the meaning of the statute, the case of State v. Haphe, 31 SW2d 788, is helpful. In that case the Supreme Court said, l.c. 790, 791:

"(2, 3) From the foregoing it appears that every person owning or holding property on the 1st day of June is liable for the taxes thereon for the ensuing year, that it is the duty of every person to list with the assessor all taxable property owned by him, or under his care, charge, or management, and that personal taxes constitute a debt against the person assessed with such taxes, the person

Honorable Don Chapman, Jr.

named in the tax bill. If the person who holds or has under his care, charge, and management personal property is liable for the taxes thereon, such taxes may be assessed against him or in his name; and, when so assessed, they constitute a personal debt for which a personal judgment against him may be recovered. Whether the care, charge, and management of personal property devolves upon one as trustee, administrator, executor, or curator, or as agent of a nonresident principal, is of no consequence; he is made liable for the taxes on the property simply because he has charge and control of it, and not because of the capacity in which he holds it. And when the taxes are assessed against one so holding property, the debt is his and not that of the estate or principal for whom he holds.

" . . . Both the person 'owning' and the person 'holding' personal property are liable for taxes thereon, and such taxes may be assessed against either or both. . . ."

State v. McGee, 44 SW2d 36, 1.c. 38, quoted with approval from State v. Haphe, supra.

In accordance with these authorities, we therefore conclude that the salesmen who are the lessees of the automobiles are liable as the holders of such automobiles for taxes assessed against such automobiles in Livingston County.

We also hold that a corporate lessee doing business in Missouri is a holder of personal property and liable for taxes on such leased automobiles.

We further hold that corporations operating in any county in the State of Missouri which are the lessors of any such automobiles are liable for the taxes assessed thereon in Livingston County. Such liability is imposed by Section 137.-075, supra, even though such section imposes the liability on "every person." The term "person" is not defined in Chapter 137.



Honorable Don Chapman, Jr.

However, paragraph (7) of Section 1.020 provides that the word "person" may extend and be applied to corporations, and this definition would control in Chapter 137 in the absence of contrary provisions in Chapter 137.

In addition, the case law is to the effect that taxes may be assessed against foreign corporations as well as domestic corporations. *City of St. Louis v. Wiggins Perry Co.*, 40 Mo. 580, was a suit against the defendant, a foreign corporation, for taxes on personal property. In that case the Missouri Supreme Court said, l.c. 587:

" \* \* \* there can be little doubt that the effect of the statutes of this state is such as to make this corporation, though chartered abroad, a resident of this state not only for the purpose of suing and being sued, by ordinary process, or by attachment, but for all the purposes of ownership of personal property and of taxation, if the same be actually situated within the city limits."

This ruling has been cited and quoted with approval in *State ex rel. Henning v. Williams*, 131 SW2d 561, l.c. 564, and *State ex rel. Northwestern Mutual Fire Association v. Cook*, 160 SW2d 687, l.c. 690.

Inherent however in this problem is the question whether Missouri can tax personal property which has been taxed to the lessor in another state. In *State ex rel. American Cent. Ins. Co. v. Gehner*, 9 SW2d 621, 623, the Supreme Court, en Banc, said, l.c. 623:

"Each state is sovereign, and, where it has a right to impose a tax, it cannot be deterred from imposing it by the fact that some other state has seen fit to tax the same property. It is not a double taxation. 37 Cyc. 755; *Judy v. Beckwith*, 137 Iowa 24, 114 N.W. 656, 15 L.R.A. (N.S.) 142, 15 Ann. Cas. 890. In the latter case a copious note cites numerous cases illustrative of the rule. It is not unconstitutional or in conflict with any rule of law."



Honorable Don Chapman, Jr.

Hence, it clearly appears that Missouri validly can and does tax such leased automobiles whether or not the lessor pays a tax in another state.

#### CONCLUSION

Motor vehicles situated or held in Livingston County which are owned by a domestic or foreign corporation doing business in this state or which are leased to a corporate lessee doing business in this state or which are leased to an individual residing in Livingston County, are subject to assessment or taxation in Livingston County even though taxes have been paid on such motor vehicle in another state. Such motor vehicles are assessable in Livingston County to the corporate lessor doing business in this state or to the corporate lessee doing business in this state or the individual lessee residing in Livingston County.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

WWW:BJ; JGS:ml

Opinion No. 62 Answered by Letter

Sec. 454.240 (4) RSMo 1959 of the Uniform Reciprocal Enforcement of Support Law authorizes the punishment for contempt of court of a defendant-father for wilful non-payment according to a support order. Although some question can be raised as to the constitutionality of this statute, it will be deemed to be valid unless judicially ruled to the contrary.

December 5, 1963



Honorable Paul McGhee  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Mr. McGhee:

We have your opinion request in which you inquire as to the constitutionality of a proceeding to imprison a defendant-father for wilful non-payment of a support order under the Uniform Enforcement of Support Law.

Statutory authority to punish a defendant-father for wilful non-payment according to a court order is apparently granted in Sec. 454.240 (4), RSMo 1959 which reads as follows:

"To punish the defendant who shall violate any order of the court to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court."

We concede that there is some question as to the constitutionality of this section by reason of Art. I, Sec. 11 of the Missouri Constitution (Imprisonment for debt) and by reason of Missouri cases relating to the non-payment of alimony or non-payment of child support in purely intra-Missouri situations. See Coghlin v. Ehlert, 39 Mo. 285, 286; Ex Parte Kinsolving, 116 S.W. 1068, 1072; Harrington v. Harrington, 121 S.W. 2d 291, 293. Note, however, that none of these cases precisely rules the instant question.

Honorable Paul McGhee - 2.

December 5, 1963

It has been the long-standing policy of the Attorney General's office to try to uphold the constitutionality of an act of the legislature unless same is obviously void on its face. In this instance, we cannot categorically state that Sec. 454.240 (4) is void on its face. Thus, if it is unconstitutional, we think it is the prerogative of the courts to so declare it.

Thus, unless Sec. 454.240 (4) is judicially ruled unconstitutional, we shall presume it to be constitutional.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

BALLOTS:  
ELECTIONS:  
VOTERS:

Ballots marked in the proper square with a cross or X mark or a check or V mark are valid.

October 4, 1963

OPINION NO. 63

Honorable William J. Esely  
Prosecuting Attorney  
Harrison County  
Bethany, Missouri



Dear Sir:

This is in answer to your opinion request which reads, in part, as follows:

"One other question involved the manner of marking a ballot, that is as to whether or not it had to be in the form of an 'X' or could be a check mark or some other mark. I have found at least one case which seems to indicate that it does not necessarily have to be an 'X' but can be a check mark as long as the lines of the two marks intersect, at an angle."

The problem presented appears to be - what kind of mark must the voter make in the appropriate square or circle to be considered a valid mark? It will be noted that Section 111.580, RSMo 1959, repeatedly refers to "cross (X) mark." The statute then defines a cross or X mark in the following language:

" \* \* \* A cross (X) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (X) mark therein is irregular in form."

In the case of Riefle v. Kamp, 247 SW2d 333, 337, the St. Louis Court of Appeals pointed to the objects to be kept

Honorable William J. Esely

in mind in determining the validity of the markings on a ballot:

"In settling these questions three objects must be kept in mind: 1, The intention of the voter. 2. The secrecy of the ballot; and 3, The requirements of the statute. If the voter's intention can be gathered from his ballot, without laying down a rule which may lead to a destruction of its secrecy, and the voter has substantially complied with the statute, his intention should be given effect. If a mark shows the voter's intent but at the same time serves the purpose of indicating who voted it, or if the voter has failed to substantially comply with the directions of the statute in making the voting mark, the ballot should be rejected."

The Court also pointed out the policy of our statutes in the following language, l.c. 339:

"Our statute sets a liberal pattern for the courts and the courts have adopted a policy of liberal interpretation in favor of the voter in all questions. The statute does not provide that a ballot should be rejected when not marked exactly as directed, but tends to favor the voter in an imperfect compliance. The provisions as to marking a ballot tend to limit the citizen in his exercise of the right of suffrage and should be liberally construed in his favor. When the statute does not expressly declare that a particular informality voids a ballot, it would appear the better policy to consider the statutory requirement as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if, in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials; that is

Honorable William J. Esely

as objects themselves, and not merely as means. If the voter has made an honest effort to express himself in the manner provided by statute his vote should be counted."

The Court then considers whether or not a so-called V or check mark complies with the statutes and concludes that it does, in the following language, l.c. 340:

"We conclude that where two reasonably straight lines meet within the voting space at an angle of less than ninety degrees, forming a solid juncture so that the end of one line also forms the end of the other line, the voter has substantially complied with the statute and the vote should be counted, unless objectionable for other reasons."

#### CONCLUSION

Ballots marked in the appropriate square by the voter with one of the various types of crosses or X marks or a check or V mark should be considered valid if the voter's intention can be gathered from his ballot and the marking is not such as to serve the purpose of indicating who voted the ballot.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

JGS:ml



BONDS:

The bond of the county collector of second class counties shall be fixed as provided

COUNTY COLLECTORS: in Subsection 1 of Section 52.020, RSMo 1959, within the limits provided in Section 52.380.

Opinion No. 64 (Denman)

February 5, 1963



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Mr. Burrell:

This is in answer to your letter of January 10, 1963, requesting an opinion of this office on the following matters:

"Our County Court has received a letter from W. T. Scott, Supervisor, County Department of Revenue, this letter purports to say the County Collector must put up a bond in the amount of the sum of the collections for the month of December 1961 plus 10%. Along with this letter he sends us the bond form #27, and on the second page of this bond form, it provides that if the County Court has applied the 'Depository Law' to the County Collector, then the bond may be considerably reduced. The exact language is as follows, 'it is made in a sum equal to one-fourth of the largest total collections made during any one month of the year immediately preceding his election plus 10%.'

"In arriving at this figure, do you take the total collections for the month of December and add 10% of that figure to that figure and then divide by four, or do you take the total collections in the month of December, divide it by four and then add thereto the sum of 10% of the collections for December.

Honorable Don E. Burrell

"Also in reading RSMo 59, section 52.020, I find a provision as follows, 'no collector shall be required to give bond in excess of the sum of \$750,000.00,' and I do not find where this provision has ever been repealed.

"Naturally, our County Court is anxious to reduce the bond premium as much as possible, and I would much appreciate your opinion on No. 1 the method of computing the amount of bond outlined above, and No. 2 whether or not the \$750,000.00 limitation is applicable to Greene County, a second-class County."

Section 52.020 RSMo 1959 provides:

"1. Every collector of the revenue in the various counties in this state, \* \* \* before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, \* \* \* in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of the amount; but no collector shall be required to give bond in excess of seven hundred and fifty thousand dollars. \* \* \*

"2. In all third and fourth class counties the county court may require the county collector to deposit daily all collections of money in the depositories selected by the county court \* \* \*. If daily deposits are required to be made, the county courts may also require that the bond of the county collector shall be in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding his election or appointment, plus ten per cent of the amount. \* \* \*"

Section 52.380 RSMo 1959, relating to class two counties, provides:

"From and after the taking effect of this section the bond of the county collector in all counties herein included shall be

Honorable Don E. Burrell

not less than fifty thousand dollars nor exceeding seven hundred and fifty thousand dollars, the amount of said bond to be fixed by the county court, \* \* \*."

There seems to be some conflict between Sections 52.020 and 52.380 inasmuch as Section 52.020 prescribes the method for determining the amount of the bond of the county collector for all counties, whereas Section 52.380 provides that the amount of the bond of county collectors in counties of the second class shall be fixed by the county courts. Section 52.380 sets a lower limit of \$50,000, and both sections set an upper limit of \$750,000.

Prior to 1959, second class counties were included in what is now subsection 2 of Section 52.020, which provides that the county courts of third and fourth class counties may require daily deposits by the county collector and, if so required, may reduce the bond of the collector accordingly. However, the conflict was still present as this provision also prescribed the method of computing the amount of the bond and did not leave it to the discretion of the county court in second class counties.

The statutes were passed to insure that the public is adequately protected against any mismanagement of funds by the various county collectors, and the methods of determining the amount of the bonds sufficient to protect the public were prescribed for all counties.

In construing statutes which appear to be in conflict, the court must harmonize such statutes, if possible, with the general legislative purpose and give force and effect to each. *State v. Crouch*, 316 SW2d 553. It is not reasonable to believe that in Section 52.380 the Legislature intended to except class two counties from provisions of Section 52.020 and allow the county courts of such counties almost unlimited discretion in fixing the amount of the bond of the county collector. It is our opinion that the bond of the county collector of counties of the second class must be determined by the method provided by subsection 1 of Section 52.020. However, the bond may not be less than \$50,000 nor in excess of \$750,000.

In answer to your specific questions, Greene County as a second class county, does not come under subparagraph 2 of

Honorable Don E. Burrell

Section 52.020, and the method of computing the bond under this section is not applicable to your county. The bond form sent to you is the same as that sent to all counties and therefore includes the provisions relating to the depository law applicable to third and fourth class counties. The bond of the County Collector of Greene County must be computed in accordance with Section 52.020, subsection 1, and may not be in excess of \$750,000 nor lower than \$50,000.

CONCLUSION

Therefore, it is the opinion of this office that the bond of the county collector of second class counties shall be fixed as provided in subsection 1 of Section 52.020, RSMo 1959, within the limits provided in Section 52.380.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JHD: sr

COUNTY HOSPITALS:  
APPROPRIATIONS,  
CANNOT BE REPAID:

\$15,068.04 general revenue funds of Ray County for 1956 paid for construction of sewer line of Ray County Memorial Hospital, by county court order, not a loan, but an appropriation made for improvement and maintenance of public hospital within meaning of Section 205.230, RSMo 1959. Hospital is unauthorized to repay appropriation to Ray County.

April 4, 1963

OPINION NO. 65

Honorable Charles H. Sloan  
Prosecuting Attorney  
Ray County  
Richmond, Missouri



Dear Mr. Sloan:

This office is in receipt of your request for a legal opinion which reads as follows:

"I would like to request an opinion from your office on the following question:

"Can the Ray County Memorial Hospital legally repay the Ray County Court for money advanced by the said court to construct a sewer line prior to the time that the said hospital had funds available?

"In this connection it should be noted that the Ray County Memorial Hospital was built by money received from bonded indebtedness and under the Hill-Burton Act. This said money was paid at the time when the hospital had no funds available and was withdrawn from Class 6. Also, the Ray County Memorial Hospital now has a surplus of funds on deposit, while the funds in Class 6 of the county are practically depleted.

"I sincerely hope that this is sufficient information upon which you can render an opinion."

Honorable Charles H. Sloan

Before a satisfactory answer can be given to the above inquiry, it must first be determined whether the money expended by the county court for construction of the hospital sewer line was loaned to the Ray County Memorial Hospital, or whether there was an appropriation for the improvement and maintenance of the hospital.

Your letter of February 21, 1963, reads in part as follows:

"In reply to your letter of February 14, I have attempted to search the county records with reference to the money allegedly 'advanced' by the county court to construct a sewer line for the county hospital. The only record which appears seems to be the entry whereby the county court accepted the bid of the company which constructed the said sewer line. Nothing appears which would clarify whether this said money was a loan or whether it was a donation on the part of the county." (Emphasis ours)

We are in receipt of a letter of Mr. Alvah Renfro, Ray County Treasurer bearing date of February 18, 1963. The letter contains a statement as to what the county treasurer's records show concerning the matter of inquiry. The letter reads in part as follows:

"In checking the records, I find there were two separate warrants issued to the Vic Koch Excavating Company, 11819 East Milford Street, Independence, Missouri. The work was for trenching the sewer line to the Ray County Memorial Hospital from the sewer system of the city of Richmond, Missouri.

"These warrants were paid out of Class #6. The first warrant, dated April 9, 1956, for the amount of \$11,839.31 was honored and paid by the County Treasurer, Ruby Frakes, with treasurer's check #6066 on April 18, 1956. The second was also paid out of Class #6. This warrant #41, dated July 30, 1956, for



Honorable Charles H. Sloan

the amount of \$3,228.73 and marked balance in full on contract was honored and paid by the County Treasurer, Ruby Frakes, with treasurer's check #6265 on August 3, 1956."

In the absence of any county court records or other legal documents sufficiently showing the county court of Ray County actually loaned \$15,068.04, of county funds to the Ray County Memorial Hospital, which the hospital agreed to repay in accordance with the terms of the loan, there was no loan of county funds.

Therefore, it is our thought that the money paid to the excavating company for the benefit of the hospital, was an appropriation of county funds and not a loan.

Section 205.230, RSMo 1959, authorizes a county court to appropriate general revenue funds of the county for the improvement of a public hospital of the county, and reads as follows:

"In counties exercising the rights conferred by sections 205.160 to 205.340, the county court may appropriate each year, in addition to tax for hospital fund herein provided for, not exceeding five per cent of its general fund for the improvement and maintenance of any public hospital so established."

The payment of county funds to the construction company for trenching and connecting the Ray County Memorial Hospital sewer line with the sewer system of the City of Richmond, Missouri, by the county court, was an appropriation of county funds for the improvement and maintenance of the hospital within the meaning of Section 205.230, supra, and the purpose for which the expenditure was made was proper.

All the money expended by the Ray County Court for the benefit of the hospital was during the year of 1956. Total tax collections of Ray County for 1956, amounted to \$148,625.00, and surplus funds of the county amounted to \$209,578.00, making a total general revenue fund of Ray County for 1956 of \$358,203.00. The county court was

Honorable Charles H. Sloan

authorized by Section 205.230, supra, to appropriate not more than five percent of its general revenue of 1956 for hospital purposes, or \$17,910.15. However, the court appropriated \$15,068.04, for hospital purposes in 1956, or less than the five percent it was legally authorized to appropriate. Consequently, the amount thus appropriated was within the limitation provided by Section 205.230, RSMo 1959, and was proper. In view of the fact said section, nor any others of the Missouri statutes do not require or authorize appropriations of this class to be repaid by the recipient hospitals, the Ray County Memorial Hospital cannot legally repay the class six county funds in the sum of \$15,068.04 expended by the Ray County Court for the construction of the sewer line of such hospital.

#### CONCLUSION

Therefore, it is the opinion of this office that general revenue funds of Ray County for 1956, in the sum of \$15,068.04, paid to an excavating company for construction of a sewer line for the Ray County Memorial Hospital, by order of the county court, was not a loan of county funds to the hospital, but an appropriation of said funds by the county court for the improvement and maintenance of a public hospital, within the meaning of Section 205.230, RSMo 1959, which appropriation the hospital is legally unauthorized to repay Ray County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

PNC:jh

COUNTIES:  
COLLECTORS:  
TOWNSHIP ORGANIZATIONS:  
FEES AND SALARIES:  
COUNTY OFFICERS:

Section 52.270, RSMo 1959, limits the maximum fees and commissions on current taxes to be retained by collectors and ex-officio collectors and is not in conflict with Section 52.260, RSMo 1959.

Section 52.250, RSMo 1959, does not apply to ex-officio collectors.

OPINION NO. 66

April 8, 1963

Honorable David Thomas  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri



Dear Sir:

This opinion is given in response to your letter of January 11, 1963, requesting an official opinion of this office. You inquire,

" . . . as to (the) maximum amount  
an ex officio collector may retain of  
taxes collected in counties under town-  
ship organization."

Your inquiry is twofold. First, whether Section 52.270, RSMo 1959, limiting the fees and compensations on current taxes allowed to be retained by collectors, is applicable to the ex-officio collector of Carroll County. Second, whether Section 52.250, RSMo 1959, providing for compensation for mailing certain statements and receipts, applies to the ex-officio collector of Carroll County.

We are informed that Carroll County is a county of the third class with township organization.

Section 54.280, RSMo 1959, provides that in township organized counties the county treasurer shall be ex-officio collector. Conversely, ex-officio collectors only exist in township organized counties. Section 54.320, RSMo 1959, provides the rate of compensation for ex-officio collectors.

Section 52.260, RSMo 1959, provides, "The collector in counties not having township organization shall collect and retain the following commissions \* \* \*." (Emphasis added.) Thereupon Section 52.260 sets out 14 classifications based

Honorable David Thomas

upon "the total amount levied for any one year." We are informed the total amount levied in Carroll County would be within the limits of classification (13).

Section 52.270, RSMo 1959, provides, "No collector or ex-officio collector in the classifications indicated in subdivisions (1) to (13) of section 52.260 is allowed to retain commissions and fees provided thereby in any one year in excess of the following amounts: \* \* \* in any county coming within the provisions of subdivision (13) of section 52.260, not more than five thousand five hundred dollars. . . ." (Emphasis added.)

Since ex-officio collectors only exist in township organized counties, the words "not having township organization" effectively exclude ex-officio collectors from application of Section 52.260, RSMo 1959. Section 52.270, RSMo 1959, by express terms does apply to ex-officio collectors. However, Section 52.270 refers to the collectors and ex-officio collectors in the classifications indicated in Section 52.260. This reference to the classifications of Section 52.260 seemingly creates a conflict between the sections which is the subject of our present inquiry. Seemingly Section 52.270 provides for the maximum compensation of ex-officio collectors who come within the rate classifications of Section 52.260, whereas Section 52.260 does not apply to ex-officio collectors.

Statutes are presumed not to be in conflict. Rules of construction require that seeming conflicts be reconciled. All parts of a statute are to be construed in harmony, giving effect to every part if possible by any reasonable construction. *State v. Carolene Products Co., Mo.*, 144 SW2d 153, 155; *State v. Daues, Mo.*, 14 SW2d 990, 1001; *State v. Crouch, Mo.*, 316 SW2d 553, 554.

The seeming conflict here can be reconciled. Section 52.260 is twofold. First, it sets out certain classifications of counties, and second, uses these classifications as a scheme for setting out the rate of compensation of collectors in other than township organization counties (Section 54.320 sets out the rate for collectors in township organization counties, i.e., ex-officio collectors.) Section 52.270 expressly sets out the maximum limit of fees and compensation on current taxes to all collectors -- in township organization counties or otherwise. As a scheme for setting out these maximum limits, Section 52.270 borrows by reference the classification of counties

Honorable David Thomas

provisions set forth in detail in Section 52.260; it does not borrow the rate provisions.

In other words, Sections 52.260 and 54.320 set out the rate of compensation for collectors and ex-officio collectors, respectively. Section 52.270 sets out the maximum fees and commissions on current taxes to be retained by both collectors and ex-officio collectors. This conclusion is evident when the legislative history of Sections 52.260 and 52.270, RSMo 1959, is analyzed.

Both Sections 52.260 and 52.270 were reworded by the Legislature in 1959 (Laws 1959, S.B. No. 62). Section 52.270 prior to 1959 provided:

" \* \* \* no collector, \* \* \* shall be allowed to retain commissions and fees in any one year in excess of the following amounts: \* \* \*,"

and also contained the following proviso:

" \* \* \* provided, however, that this section shall not apply to any county adopting township organization, so far as concerns the rate of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex officio collector for collecting taxes in such counties; \* \* \*."

Section 52.270, RSMo 1949.

This proviso was added in 1933 (Laws of Missouri, 1933, p.p. 454, 456) to a former revision of this statute, viz., Section 9935, RSMo 1929, Section 11106, RSMo 1939. Section 11106 contained the provisions of what became both Sections 52.260 and 52.270, RSMo 1949. The wording of the above-quoted proviso was unchanged when the 1939 section was divided into two separate sections by the 1949 revision thereby leaving the entire proviso, quoted supra, in Section 52.270. In other words, the proviso, applicable to the whole original section, was left unchanged in a mere part of the original section by the 1949 revision.



Honorable David Thomas

The knowledge that Sections 52.260 and 52.270, RSMo 1949, were formerly one section gives meaning to otherwise meaningless words of the quoted proviso. Where it is stated "this section shall not apply to any county adopting township organization so far as concerns the rate of percent to be charged for collecting taxes \* \* \*", obviously "this section" refers to that part of Section 11106 that became Section 52.260, RSMo 1949, since there is no provision whatsoever in the part of Section 11106 that became Section 52.270, RSMo 1949, for the rate to be charged, the rate provisions being solely in Section 52.260, RSMo 1949. Where it is stated "this section \* \* \* shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex officio collector for collecting taxes in such counties; \* \* \*", it is obvious that here "this section" refers to that part of Section 11106, RSMo 1939, which became Section 52.270, RSMo 1949, since only that part provides for limitation of commissions to be retained.

Apparently the Legislature in 1959 recognized the need for correcting the 1949 revision and therefore removed the proviso discussed supra from Section 52.270 and properly divided its application. The substance of the proviso applicable to Section 52.260 as explained supra was properly added to Section 52.260 by the words, "in counties not having township organization." Thereby clearly indicating that the rates set out in Section 52.260 do not apply to ex-officio collectors of township organization counties which had, of course, been the law all along set out by the proviso although confused by the 1949 division of former Section 11106, RSMo 1939. Also, the substance of the proviso which properly referred to Section 52.270 was attached by other terms to that section. Where the former statute 52.270, RSMo 1949, provided "no collector \* \* \* shall be allowed to retain commissions \* \* \* in excess of the following amounts: \* \* \*" and then by the proviso also applied the limits to ex-officio collectors, the 1959 amended statute was made expressly applicable to all collectors by the opening line, "No collector or ex officio collector \* \* \* is allowed to retain commissions \* \* \* in excess of \* \* \*." (Emphasis added.)

In sum, the 1959 amendments of Sections 52.260 and 52.270 did not change the law but merely properly reworded the 1949 revision. Section 52.270 setting forth the maximum fees and



Honorable David Thomas

commissions on current taxes to be retained by both collectors and ex-officio collectors continues to apply to the ex-officio collector of Carroll County. State v. Ludwig, Mo., 322 SW2d 841.

As to your second inquiry, viz., whether Section 52.250, RSMo 1959, applies to the ex-officio collector of Carroll County:

Section 52.250, RSMo 1959, provides:

" \* \* \* collectors in third class counties shall receive one-half of one per cent \* \* \* of all current taxes collected \* \* \* as compensation for mailing said statements and receipts." (Emphasis added.)

Obviously the phrase "said statements and receipts" has no independent meaning but refers to some other statutory provision. The referred to provision is Section 52.230, RSMo 1959, which provides:

"Each year the collectors of revenue in all second, third and fourth class counties of the state, not under township organization, shall mail to all resident taxpayers, at least fifteen days prior to delinquent date, a statement of all real and tangible personal property taxes due and assessed on the current tax books in the name of the taxpayers. Collectors shall also mail tax receipts for all the taxes received by mail." (Emphasis added.)

Section 52.250 cannot be read without reference to 52.230. The sections are dependently related and the exclusion of township organized counties in Section 52.230 necessarily applies to Section 52.250.

#### CONCLUSION

It is therefore the conclusion of this office that the 1959 amendment of Sections 52.260 and 52.270 reworded but did not change the application of those sections and that Section 52.270, RSMo 1959, sets forth the maximum fees and commissions

Honorable David Thomas

on current taxes allowed to be retained by both collectors and ex-officio collectors and continues to apply to the ex-officio collector of Carroll County.

It is further the conclusion of this office that since Carroll County is a township organized county and such counties are excluded from the application of Sections 52.230 and 52.250, RSMo 1959, that Section 52.250 does not apply to the ex-officio collector of Carroll County and therefore he is not entitled to the additional compensation therein provided.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

LCDeF:lt;ml

May 10, 1963



Honorable Clarence P. Lehn  
Prosecuting Attorney  
Montgomery County  
Wellsville, Missouri

Dear Mr. Lehn:

This is in further response to your request for an opinion of January this year.

You set out two specific questions:

1. May a defendant who fails to make payments under the uniform support of dependents act be punished as for contempt?
2. Is the court, in a uniform support matter, obligated to appoint counsel for an indigent defendant?

Question number 1 has been the subject of lengthy research in this office and is not yet resolved. We shall inform and advise you at such time as we do arrive at an opinion on that subject.

With reference to question number 2, we presume you refer to the civil provisions of Chapter 454. If the defendant is being proceeded against in a civil matter, we find nothing which makes it mandatory that the court appoint counsel, but at least the St. Louis Court of Appeals takes the position that this is permissible in an analagous situation; see *In Re Barger*, 365 S.W. 2d 89, 90. Chapter 454, the act establishing the enforcement of support, makes no provision for the appointment of counsel to represent an indigent defendant.

Very truly yours,

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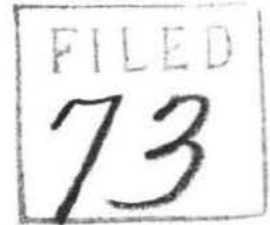
THOMAS F. EAGLETON  
Attorney General

HLM:BJ

SCHOOLS:  
SCHOOL TAXES:

City school districts having population of less than 75,000 inhabitants may increase tax rate unlimited in amount not to exceed four years with approval of two-thirds of voters or may increase tax rate not to exceed \$3.00 for one year with approval of majority of the voters.

February 15, 1963



Opinion No. 73

Honorable Earl R. Blackwell  
State Senator  
Hillsboro, Missouri

Dear Mr. Blackwell:

On January 21, 1963, you requested an official opinion from this office as follows:

"I understand that the law provides that any levy over 3 times the \$1.00 constitutional limit requires a 2/3rds vote. If the levy is \$3.00 or under then it can be passed by a simple majority. Further, if any levy is passed to extend for more than one year, it requires a 2/3rds majority.

"One of the school systems in my district has exhausted its bonding capacity and is in dire need of additional classrooms. In view of this, their only solution is to submit a special building levy for three years to provide the fund necessary for these new rooms. They desire to submit this proposition at a special election in March, and they concede it must have a 2/3rds majority. Will the \$3.00 levy require a 2/3rds majority on the first year and will it also require a 2/3rds majority for the second and third year of the building fund levy?"

We assume from the facts stated in your letter that the school district involved is a school district formed of a city or town having a population of less than 75,000 inhabitants.

Article 10, Section 11(b) of the Constitution of Missouri, 1945, provides for the maximum tax rates that may be imposed upon property by municipalities, counties and school districts in this state without voter approval. For school districts formed of cities and towns, the maximum rate is one dollar on the one hundred dollar assessed valuation.

Article 10, Section 11(c) of the Constitution of Missouri, 1945, as amended on November 7, 1950, RSMo 1959, provides that the maximum rates under Section 11(b) may be increased under certain conditions. It provides in part:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; \* \* \* provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; \* \* \*"

In Rathjen v. Reorganized School District R-II, 284 SW2d 516, the above constitutional provisions were before the court for consideration. In that case the school district in a special election had submitted a proposition to increase the school levy in excess of the one dollar maximum for a period of one year but not in excess of three times such maximum, the revenue derived therefrom to be used as a building fund for the elementary school. The proposal carried by a majority vote but was less than the two-thirds majority of the votes cast at the election. In discussing the question of whether a majority of the votes cast in favor of the proposition was sufficient, the Supreme Court of Missouri stated, l.c. 256:

"A school tax voted by a two-thirds majority may be in an unlimited amount and may be effective for not to exceed four years. A tax carried by a simple majority, however, must be limited to three times basic limit of one dollar and can be effective for one year only."

Section 165.080, RSMo 1959, implements the above constitutional provision. In part it provides the method for determining whether it is necessary to increase the tax rate and the method of holding the election. It further provides that "if the majority of the qualified voters voting thereon as required by Article 10, Section 11 of the Constitution, shall favor the proposed increase", it shall be certified to the county clerk and thus become effective. The term "majority of the qualified voters voting thereon" as used in the statute means the majority as required by the constitution depending upon the amount of the tax rate and the period of time for which it is to be effective. The statute is in harmony with the Constitution on this particular point.

#### CONCLUSION

Under the above constitutional and statutory provisions, a school district formed of a city or town having a population of less than 75,000 inhabitants has two alternatives in the method to be used in increasing the school tax in excess of the maximum provided for under Section 11(b) of Article 10 of the Constitution.

1. It may submit a tax rate unlimited in amount for a period of time not exceeding four years which proposition would require the affirmative vote of two-thirds of the voters voting thereon before it would be effective.

2. The district may submit a tax rate not in excess of three times the maximum provided for under Section 11(b) of Article 10 of the Constitution which would require the affirmative vote of only a majority of the voters voting thereon for its approval. This kind of proposition could be submitted to the voters without any limitation as to number of submissions so long as it was submitted each year and received the approval of the majority of the votes cast.



Honorable Earl R. Blackwell -4-

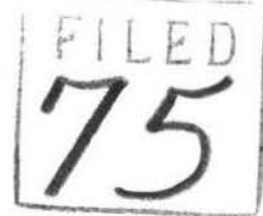
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

MM:lt



January 24, 1963

Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Mr. Burrell:

This will acknowledge your letter of January 21, 1963, requesting copy of opinion No. 396-62, to Hon. Charles D. Trigg, relating to criminal costs and suspended sentence, and in which you also request the opinion of this office concerning the taxation of jury costs in civil cases.

In answer to your first request, we enclose copy of the opinion requested. We also enclose copy of opinion of this office dated January 4, 1963, to Hon. Norman H. Anderson, which we believe will answer your second request. Although that opinion is primarily directed to the question of the liability of the State for jury fees in criminal cases, the conclusions there reached are applicable generally. At the extent here relevant, we quote from the conclusions in that opinion, as follows:

"2) Members of the regular panel of jurors receive six dollars per day for each day of service, and mileage, payable out of the county treasury. No part of such compensation may be taxed as part of the costs.

"3) Jurors not on the regular panel who serve in a particular case receive six dollars per day for each day of service

January 24, 1963

as jurors, and mileage, also payable out of the county treasury. No part of such compensation may be taxed as part of the costs.

\* \* \* \* \*

"5) Jurors, not members of the regular panel, who are summoned in all cases other than those described in Section 494.120 but do not serve in the trial of the cases, receive fees in the sum of three dollars per day for each day of attendance. The fees allowed to such jurors are to be taxed as part of the costs in the cases in which such jurors were summoned."

We believe the reference to Section 494.170 in your letter was inadvertent, inasmuch as that section makes no provision for the payment of six dollars a day to jurors. No doubt the section to which you have reference is Section 494.100, which is discussed in the Anderson opinion. However, as our opinion points out, the only provisions of our statute presently in force relating to taxation of individual jury fees is Section 494.170, which governs fees of jurors not members of the regular panel who are summoned but do not serve in the trial of a particular case. Such jurors receive three dollars per day for each day of attendance. They are not entitled to mileage because mileage is authorized under that section only for jurors who serve in the trial.

You will note that there is no authority to tax as costs any jury fees at the rate of six dollars per day, plus mileage, for each of the 18 jurors attending on the panel, in addition to the statutory twelve dollar jury fee authorized by Section 494.160.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr  
Enclosures - 2

PUBLIC ASSISTANCE:

AID TO DEPENDENT  
CHILDREN:

1) It is not mandatory that the defaulting parent be prosecuted as a condition precedent to the granting of A.D.C. benefits. 2) Support payments or other income should be deducted from the needs of the family as determined by the Division of Welfare and not from the maximum amount payable under Section 208.150.

January 24, 1963

Opinion No. 78 - 1963

Mr. Proctor N. Carter, Director  
Division of Welfare  
State Office Building  
Jefferson City, Missouri



Dear Mr. Carter:

This will acknowledge receipt of your letter of January 14, 1963, requesting an official opinion as to the construction of Section 208.040, Subsection (2), RSMo 1959, and Section 208.010, RSMo 1959, relating to the administration of the Aid to Dependent Children program in Missouri.

Restating your request for sake of brevity, in your first question you inquire whether under the provisions of Section 208.040, Subsection (2), RSMo 1959, it is mandatory or a condition precedent to the granting of Aid to Dependent Children benefits by the Division of Welfare to require that the defaulting parent be prosecuted to secure support for a dependent child.

Section 208.040, Subsection (2), RSMo 1959, reads as follows:

"\* \* \* provided; however, that when benefits are claimed on the basis of continued absence from the home of a parent and such absence is due to divorce, desertion or non-support of a child by a parent, the Division of Welfare shall as a condition to granting of benefits require the claimant to initiate or prosecute legal proceedings against the defaulting parent to secure support for such child, or through its investigation determine that the claimant has in good faith informed and assisted the proper

authorities and made all reasonable efforts to apprehend the parent and charge him with the support of said child. When any report is made to the prosecuting attorney of the desertion or nonsupport of a child for whom benefits are claimed, and the whereabouts of the deserting or defaulting parent is known, or can be ascertained, it shall be the duty of the prosecuting attorney to fully investigate all the facts concerning the desertion or nonsupport and institute such action as he deems necessary to secure support for such child. If the prosecuting attorney determines for any reason that an action should not be instituted, a report of his findings and the reason an action was not instituted shall be made to the Division of Welfare. \* \* \*

It is to be noted that the above provision requires a claimant to initiate or prosecute legal proceedings against the defaulting parent to secure support for such child or the Division of Welfare through its investigation determine that the claimant has in good faith informed and assisted the proper authorities and made all reasonable efforts to apprehend the parent and charge him with the support of said child.

The above quoted portion of Section 208.040, Subsection (2) does not provide that it is a mandatory requirement or a condition precedent to the granting of Aid to Dependent Children benefits by the Division of Welfare that the defaulting parent be prosecuted to secure support for a dependent child. The compliance or non-compliance with the provisions of this section is a question of fact and if the Division of Welfare determines that the claimant has in good faith informed and assisted the proper authorities (including the Prosecuting Attorney) and made all reasonable efforts to apprehend the defaulting parent and charge him with the support of a child, the Division of Welfare is authorized to find the claimant eligible on this point of eligibility.

We understand your second question, in a broad sense, to be: In determining the amount of grant an eligible Aid to Dependent Children claimant is entitled to receive should support payments be deducted from the amount determined by the Division of Welfare under Section 208.010, RSMo 1959, to be necessary for a "reasonable subsistence compatible with decency

and health" or should they be subtracted from the maximum amount payable as specified in Section 208.150, Subsection (3), RSMo 1959?

Section 208.010, RSMo 1959, provides, in part, as follows:

"In determining the eligibility of a claimant for public assistance under this law, it shall be the duty of the division of welfare to consider and take into account all facts and circumstances surrounding the claimant, including his living conditions, earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied. The amount of benefits, when added to all other income, resources, support and maintenance, shall provide such persons with reasonable subsistence compatible with decency and health in accordance with the standards developed by the division of welfare. \* \* \*"  
(Underscoring ours.)

It appears to us that under the provisions of Section 208.010 need is a basic eligibility factor underlying the determination of whether a family or individual is eligible to receive public assistance benefits. The assistance payment that is made to a needy claimant is to supplement the income, resources, support and maintenance when these are inadequate to provide a reasonable subsistence compatible with decency and health in accordance with standards developed by the Division of Welfare. See also Section 207.020, Subsection 19. The amount of the benefit payment, however, cannot exceed the maximums as specified in Section 208.150, RSMo 1959. The budgetary method of determining need has been held by our Appellate Courts to be a fair and proper method of applying the public assistance law. *Kelley vs. State Social Security Commission*, 161 S.W.(2d) 661.

In view of the provisions of Section 208.010, *supra*, the needs of an eligible Aid to Dependent Children claimant are to be determined by deducting any support payments or other income from the needs as computed by the application of standards developed by the Division of Welfare and the amount of benefits paid shall not exceed the maximum specified in Section 208.150, RSMo 1959.



CONCLUSION

It is, therefore, the opinion of this office that:

1) It is not mandatory or a condition precedent to the granting of Aid to Dependent Children benefits by the Division of Welfare that the defaulting parent be prosecuted to secure support for a dependent child;

2) Support payments or other income received by an eligible Aid to Dependent Children claimant should be deducted from the needs of the family as determined by the Division of Welfare by the application of standards developed by the Division of Welfare and not from the maximum amount payable as specified in Section 208.150, Subsection (3), supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

MM:lt

February 12, 1963



Honorable Charles B. Faulkner  
Prosecuting Attorney  
Lawrence County  
Mt. Vernon,  
Missouri

Dear Sir:

This letter is in answer to your opinion request of January 28, 1963. In particular you raise the following questions:

"1. Would the County Court have the power to use general funds to maintain, repair or make necessary alterations of a Nursing Home Building? Would they have the power if the premises are leased to a non-profit organization which operates and cares for the resident patients?

"2. Would the County Court have the power to use general revenue funds to care for resident patients in a County Nursing Home? Would they have the power to give subsidy to a patient where the County Nursing Home is leased to a non-profit organization primarily designed to control, handle and care for the patients?"

In regard to the first question, we believe the County Court would have power to use the county funds to

Honorable Charles B. Faulkner - 2

maintain and repair the county-owned nursing home. We believe that this action would also be permitted where the home was leased to a non-profit organization as provided for in Section 205.375, RSMo 1959. This section expressly authorized the acquisition of land and the construction and equipment of nursing homes. We believe it would necessarily follow that the County Court would have authority to preserve, maintain and repair this county building. As you suggest in your letter, Section 49.470, RSMo 1959, certainly seems to support this conclusion since it provides that the county shall have power to alter or repair county buildings.

In connection with your second question, we believe that the County Court has the power to use county funds to care for resident patients either in a county-operated nursing home or in a nursing home constructed by the county and leased to a non-profit organization. We believe that an opinion issued by this office on May 26, 1959, to the Honorable Charles Cable, Prosecuting Attorney of Dunklin County, likewise answers this question in the affirmative. That opinion held that the County Court had a duty to provide for its indigent, aged residents, and that the court could do so even by making payment to private institutions where this was deemed economically feasible. The opinion further held that these payments could be in addition to old age assistance payments made by the State.

We are enclosing a copy of this opinion for your convenience.

Very truly yours,

CB:df  
enc.

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THOMAS F. EAGLETON  
Attorney General

May 22, 1963

OPINION REQUEST NO. 83  
ANSWERED BY LETTER

Honorable Thomas R. Beveridge  
State Geologist  
Post Office Box 250  
Rolla, Missouri



Dear Mr. Beveridge:

This office is in receipt of your request for our official opinion as to whether or not sand and gravel are legally considered mineral resources in Missouri. We construe the inquiry to ask if sand and gravel are legally considered to be minerals or non-minerals in this state insofar as the mining laws are concerned.

The answer to this question will depend upon any statutory definition of mineral and non-mineral elements, as well as any appellate court decisions, if any, construing such statutory definition. While we do find such a statutory definition, we find no Missouri appellate court decisions construing same.

The mining laws of Missouri are embraced within Chapter 293, RSMo 1959, entitled, "Mining Regulations". Section 293.010 of said chapter is a definition section, providing, that unless the context clearly requires otherwise as used in the chapter, the terms used therein shall have the meanings ascribed to them in such section. Section 293.010(5), reads as follows:

"(5) 'Mineral', any metalliferous element or ore, coal or lignite, or any non-metalliferous element or ore, except barite, marble, limestone, and sand and gravel;"

We find no other portion of Chapter 293 in which the context clearly requires the terms, sand and gravel to be used in a different sense or to be given a different meaning than that appearing in Section 293.010(5). From the language used in

Honorable Thomas R. Beveridge

this subsection, obviously the legislative intent in the enactment of same was that those elements named in the subsection as minerals are to be legally considered as minerals and all those elements excepted from such definition, including sand and gravel, are to be legally considered non-minerals, within the meaning of the subsection.

Therefore, in view of the foregoing, it is our opinion that sand and gravel are legally considered not to be minerals in Missouri, in contemplation of the mining laws of Missouri.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

PNC:jh

SCHOOLS:  
COMPULSORY SCHOOL ATTENDANCE:  
MINORS:

Neither the parents nor the husband of a married child under sixteen years of age have the charge, control or custody of such married child within the meaning of the compulsory school attendance law of Missouri.

OPINION NO. 84

March 29, 1963

Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Burrell:

This is in reply to your letter of January 29, 1963, in which you requested an opinion of this office on the following questions:

" Is a child under 16 years of age, who is married, sufficiently emancipated from the 'charge, control or custody' of her parents so as to relieve the parents from the criminal responsibility for failing to cause the child to attend school regularly? If so, then:

"By marrying a child under the age of 16, does a man take on the responsibility required by Section 164.010 to cause the said child to attend school regularly?"

The compulsory school attendance law in Missouri is contained in Section 164.010, RSMo 1959, the first paragraph of which reads as follows:

"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which the child attends is in session or shall provide the child at home with regular daily instructions during the usual school



hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day schools in the locality in which the child resides."

We have been unable to find any case in Missouri which specifically answers your particular question and we have therefore turned to the decisions in other jurisdictions for guidance.

The general rule is stated in 67 C.J.S. Sec. 89 c, page 816, that " \* \* \* It is settled that the marriage of a minor child with the consent of the parent works an emancipation of the child, \* \* \*."

In the case of *In re State in interest of Goodwin*, 214 La. 1062, 39 So. 2d 731, 1. c. 733, it is said:

" . . . Clydell is irrevocably emancipated by this marriage as a matter of right. . . . And although until she reaches the age of 18 she is not relieved of all of the disabilities that attach to minority by this emancipation, she is relieved of parental control and, . . . is no longer amenable to the compulsory school attendance law of this state. Furthermore, having acquired the status of a wife, it is not only her right but also her duty to live with her husband at their matrimonial domicile and to follow him wherever he chooses to reside."

The applicable statute in Louisiana is similar to the Missouri statute in that the Louisiana statute provides:

" \* \* \* every parent, guardian, or other person \* \* \* having control or charge of any child \* \* \* shall send such child to \* \* \* school". (Act No. 239 of 1944, Louisiana.)

In the case of *State v. Priest*, 27 So. 2d 173, 174 the Supreme Court of Louisiana said:

"This Court, in *State v. Golden*, 26 So. 2d 837 held that while the performance of a marriage ceremony by public officials of females between the ages of 14 and 16

is prohibited by law and the public officials who perform such marriage are subject to the penalties provided by the Act, nevertheless, such marriage once performed becomes a valid and legal marriage (if there are no legal impediments other than age), and that the female minor thus married enjoys the status of a wife and has a right to live at the matrimonial domicile of her husband and is no longer under the control of her parents.

" [1] The marriage relationship, regardless of the age of the persons involved, creates conditions and imposes obligations upon the parties that are obviously inconsistent with compulsory school attendance or with either the husband or wife remaining under the legal control of parents or other persons. Though young, the husband is none the less required to support his wife and family. The wife, in the event there should be a child in the family, could hardly be expected to attend school during the weeks preceding or following its birth.

" [2,3] It might be argued that the relation comes within the provisions of Act No. 239 of 1944 on the theory that her husband could be considered as a ' \* \* \* person \* \* \* having control or charge of any child \* \* \*.' Article 2404 of the Revised Civil Code provides that 'The husband is the head and master of the partnership or community \* \* \* between himself and his wife but this, of course, is primarily a rule for the control of common property. No reasonable man, particularly one who has been married for many years, would contend that the husband, by virtue of the provisions of the above article or any other law, has 'control or charge' of his wife in the manner formerly exercised by the parent or guardian."

Honorable Don E. Burrell - 4

In the case of *In re Rogers*, 234 N.Y.S. 2d 172, the Family Court of Schuyler County, New York held that compulsory education laws do not require school attendance by a female child under sixteen years of age, against her will, when married and residing with and maintaining a household for her husband.

On the basis of these authorities we are of the opinion that a child under sixteen years of age who is married is relieved from the charge, control or custody of her parents within the meaning of Section 164.010 RSMo 1959. We are further of the opinion that the husband of a female minor under sixteen years of age does not have the charge, control or custody of his wife within the meaning of the provisions of Section 164.010 RSMo 1959.

#### CONCLUSION

It is therefore the opinion of this office that neither the parents nor the husband of a married child under sixteen years of age have the charge, control or custody of such married child within the meaning of the compulsory school attendance law of Missouri.

The foregoing opinion which I hereby approve was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

WWW:df

CONSTITUTIONAL LAW:  
NON-PARTISAN COURT PLAN:  
COURTS:  
MAGISTRATES:  
PROBATE JUDGES:  
ELECTIONS:  
ST. LOUIS COUNTY:  
CIRCUIT COURTS:

The non-partisan court plan can be extended to St. Louis county and other circuits by statute. Non-partisan court plan can be adopted without including magistrates in such plan. Non-partisan court plan can be adopted without including office of probate judge and ex officio magistrate. Non-partisan court plan can be adopted in St. Louis county without submitting question to voters.

February 5, 1963



Honorable William B. Waters  
State Senator, 17th District  
Capitol Building  
Jefferson City, Missouri

Dear Senator Waters:

We have your opinion request posing various constitutional questions on the possible extension of the non-partisan court plan to St. Louis county and possibly one or two other circuits.

It has long been the policy of this office to defend the various statutes passed by the legislature whenever the constitutionality of a statute is brought into question in a matter in which we are involved. If the Attorney General were to rule that a statute was unconstitutional and then in a subsequent law suit turn around and argue in favor of the constitutionality of same, he would be placed in an almost untenable position.

Further, as in this instance when the legislature is aware of possible constitutional attacks which might be made on a given statute and decides to enact legislation in light of same, then we feel that we should not substitute our notions of constitutionality for those of the legislature, but should to the best of our ability defend the action of the legislature.

Finally, of course, there exists the general rule of law that a statute is presumed to be constitutional and we are loathe in debatable gray areas to unilaterally overrule this presumption.

The foregoing constitute general observations which can be made whenever we are asked about the constitutionality of a statute.

Your questions are further complicated by the fact that the Missouri Supreme Court specifically raised some of these questions in the case of State ex rel. Millar v. Toberman, 232 SW2d 904, but declined to answer them labeling them as "uncertainties" requiring "further study."

Honorable William B. Waters

Therefore, it is entirely likely that whatever course the legislature might pursue in extending the non-partisan court plan to St. Louis county and possibly one or two other circuits will result in a court test wherein our office will be called upon to defend the legislation or procedure in question.

Thus, as is frequently true in constitutional areas which are more often than not in the debatable gray area rather than in the black or white category, our answers to your questions are in the main necessarily something less than categorical.

Question #1. "Is it constitutionally possible to achieve the purposes of the bill under Section 29 (a) through (g), Article 5 of the 1945 Constitution by statutory enactment and without the submission of a constitutional amendment specifically amending Section 29 (a)?"

This we will attempt to answer unqualifiedly. We see no necessity to submit a constitutional amendment on Section 29 (a) in order to achieve the purposes of the bill.

Question #2. "Is it constitutionally possible to eliminate Magistrate courts from coverage under the non-partisan court plan in the counties seeking to come under the same? This question is raised, inasmuch as, since the adoption of the 1945 Constitution, Magistrate courts have been, by legislative action, designated as courts of record."

This is one of the questions the answer to which the Missouri Supreme Court labeled as "uncertain" and requiring "further study." Debatable as it may be, it is our view that a reasonable argument can be made in support of the constitutionality of same and we would make such an argument when and if litigation should develop.

Question #3. "In the event circuits containing the combination office of Probate-Magistrate court seek inclusion under the proposed legislation, is it further possible to eliminate their inclusion as aforesaid? Your attention is directed to the fact that under the Constitution, Probate courts are courts of record."



Honorable William B. Waters

Our answer is the same as with respect to Question #2.

Question #4. "Should the General Assembly merely enact legislation directing that the Circuit courts and Probate court of St. Louis county be under the non-partisan court plan without any submission of the question to the voters, would it be constitutional under Section 29 (g)?"

We take this question to mean, in essence, can the legislature, if it sees fit, by-pass the procedures as spelled out in Section 29 (a) through (g) and merely by statute, without submitting the question to the voters, extend the non-partisan court plan to St. Louis county?

Debatable as it may be, it is our view that a reasonable argument can be made in support of the constitutionality of same and we would make such an argument when and if litigation should develop.

Finally, we wish to mention the fact that the foregoing answers given to your general questions can well be influenced by and depend upon the precise language of the bill which ultimately may pass the legislature.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

TFE:jh



LOTTERIES:  
SALES:  
REFERRAL SELLING:

Plan whereby buyer of merchandise receives commission on each purchase by persons to whom he refers salesman is a lottery.

February 6, 1963

OPINION NO. 86

Honorable Daniel P. Reardon, Jr.  
Circuit Attorney  
City of St. Louis  
Municipal Courts Building  
St. Louis, Missouri

Dear Mr. Reardon:

This is in response to your request for an opinion of this office which request reads as follows:

"Our office has received a series of complaints from the Better Business Bureau and from private individuals relative to a scheme called "Referral Selling." I have enclosed photostats of portions of our file to give an indication of the scope of the problem.

"The general tenor of the complaint is as follows: The business in question will have their salesman contact a customer to sell a product. As part of the inducement to buy, the customer will be told that if he would submit the names of twenty close friends and write a letter of introduction for the salesman to these friends, six of these twenty will subsequently be chosen by the salesman for future contacts. For each contact that is made, allowing the salesman to make a demonstration of his product or simply to outline his program, the original customer will receive a gratuity. If a sale is made, a further gratuity will be made. Also, the customer who had originally referred the salesman to his present contact would receive a gratuity, if this present contact makes a purchase. The sum of the gratuities to be received, if all



Honorable Daniel P. Reardon, Jr.

goes right, usually exceeds the purchase price; and these gratuities are frequently promised to continue into several rounds of subsequent sales. You will notice in the enclosures that there is a detailed complaint of this type of situation.

"Based upon this hypothetical set of facts, we wish to formally request of the Attorney General his legal opinion as to whether or not the scheme as elicited and popularly called 'Referral Selling' would constitute a lottery according to the existing Missouri Statutes on the subject."

Within the past few months, this office has received many complaints similar to those attached to your inquiry. The merchandise being sold by such methods may be water softeners, stereophonic record players, automobiles, or home fire alarm systems, but there are several elements which, on the basis of our experience and as confirmed by the attachments to your letter, seem to be common to all such schemes:

1. The seller de-emphasizes the fact that the transaction is a sale, frequently initiating his contact with prospective buyers by telling the latter that they are going into the "advertising business" together. The prospective buyer is then told how he will make large sums of money which will more than pay for the item he purchases as he receives his commission from the sales made to prospects to which he refers the seller. These commissions, it is often promised, will continue into the second, third, or even fourth "generation" of sales. In fact, the buyer seldom receives any of the promised commissions and, as far as we can determine, a buyer has yet to receive more money from such a transaction than he is required to pay out for the merchandise.

2. The second element common to virtually every one of these schemes is the almost immediate negotiation of

Honorable Daniel P. Reardon, Jr.

the promissory note signed by the buyer. This transaction, consummated rapidly, then leaves the buyer facing a "bona fide purchaser" of the note whose rights under the note are not contingent upon the success or failure of the "advertising venture". In some cases of this nature, the obligation of the buyer is secured by a mortgage on his home which gives even additional leverage to the "bona fide purchaser" in his subsequent dealings with the erstwhile "advertiser".

3. In many of these schemes, the seller either leaves the locality after making several hundred sales or the seller declares bankruptcy. In either event, his buyers are then left with no hope of ever recouping any of their investment through commissions on referral sales because there is no one to do the selling and no merchandise to be sold.

4. The merchandise sold by these tactics is often of inferior quality and greatly overpriced. When finance charges, by whatever name they may be called in the promissory note, are added, the disparity between price and value received frequently becomes tragically ludicrous. Unfortunately, the lack of quality in the merchandise frequently does not become apparent until after the buyer assumes his obligation to pay since the sales are customarily made from catalogues with no opportunity for inspection of the merchandise. One group of operators promoting a scheme of this kind sold a line of large electrical appliances labeled with a nationally known brand name. The appliances were not, in fact, products of the nationally known manufacturer but low-quality "counterfeits" produced by a little known firm.

Turning now to your question whether schemes of this type are lotteries, we note that our Supreme Court has held "that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance." State v. Emerson, (Mo. Sup. 1927) 1 SW2d 109, 111. In State ex inf. McKittrick v. Globe-Democrat Publishing Company, (Mo. Sup. 1937) 110 SW2d 705, 713, the Court said simply, "The elements of a lottery are: (1) Consideration; (2) prize; (3) chance."

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Although lotteries are condemned by the constitution of this state, Constitution of 1945, Article III, Section 39 (9) and although their establishment is deemed a felony by statute, Section 563.430, RSMo 1959, we have no statutory declaration that a scheme of the specific type we are considering here is a lottery. In the absence of a clear statement by the Legislature to that effect, it will be necessary to measure the facts of the typical referral selling plan against the above quoted definitions of the term "lottery".

CONSIDERATION: In all plans of this type, the customer "buys" something, be it an automatic fire alarm system or an electric coffee maker, in the sense that he gives a promissory note in exchange for the merchandise. Value of the note is attested to by the fact of its negotiation and, in many cases, its subsequent enforcement. Even if the merchandise can be regarded as a fair exchange for the amount of the note, the purchase price will still constitute the "consideration" necessary to the existence of a lottery. Hence, in *State v. McEwan*, (Mo. Sup. 1938) 120 SW2d 1098, 1100, it was of no import that persons purchasing a theater ticket were permitted to view a moving picture in addition to having an opportunity to win the "bank night" drawing. Quoting with approval from a decision in another jurisdiction, our Supreme Court said, 1.c. 1100:

"It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given. The things to be seen and done in the theater and the privileges above enumerated which accompanied them, are all a part of one and the same show, meaning the entire proceedings inside the theater. The fact that part of the things to be enjoyed by those who paid at the door were classed as 'free' by the defendant in error does not change the legal effect of the transaction, or what was

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actually done by defendant in error, namely, for the price of admission to grant the patron not only the opportunity to see and hear the picture, but to see and hear and enjoy the habiliments of the 'Bank Night,' drawing, etc., detailed above."

Likewise, the Court ruled in *State ex rel. Home Planners Depository v. Hughes* (Mo.Sup. 1923) 253 SW 229, 230, that the scheme described therein was a lottery, stating that "The fact that each certificate holder eventually might or would receive an amount equal to the aggregate of his payments can make no difference if, in addition, each secured a chance for a prize." See also *State v. Emerson*, (Mo.Sup. 1927) 1 SW2d 109, in which a scheme was declared a lottery wherein participants making weekly payments of \$1.00 each would obtain \$55.00 worth of furniture after paying that amount or, if selected by the furniture company prior to the fifty-fifth installment, they would receive \$55.00 worth of furniture for the amount they had paid to date. A similar plan involving suits of clothes was held to be a lottery in *State v. Meyer Tailoring Co.*, (Mo.Sup. 1929) 25 SW2d 98, in spite of the \$45.00 limitation on the amount to be paid in by weekly installments and the fact that each participant would obtain a suit of clothes presumably of that value regardless of whether he paid the full \$45.00 or was previously relieved of making further payments by being arbitrarily selected by the company as a recipient of its favors.

PRIZE: The element of prize is readily apparent in the referral selling schemes discussed above: The participant is to receive a stated amount of money for each "lead" he furnishes to the seller which results in a sale. As indicated in your letter, some plans of this nature include an arrangement whereby a certain commission is paid to the participant whenever any of the "contacts" provided by him merely sit through the demonstration and sales pitch. In many cases, a commission is promised to the original participant for each sale made to the "leads"



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furnished by those purchasing as a result of the salesman's being referred to them by the original participant. Hence, such plans are said to benefit the original participant into the second, third, or fourth "generation" of sales.

At the very least, participants are promised that they will recoup the amount of the purchase price and are frequently induced to enter the "advertising" plan on the assurance that it will be a source of extra income, over and above what is necessary for payments to the finance company, into the indefinite future.

As in State ex inf. McKittrick v. Globe-Democrat Pub. Co., (Mo. Sup. 1937) 110 SW2d 705, 717, this is "an opportunity . . . to gain some 'easy money'." A better example of the element of "prize" could hardly be imagined.

CHANCE: Somewhat more elusive in the referral selling schemes is the element of chance. However, for the reasons hereinafter stated, we are of the opinion that this element is inherent in the plans.

The scheme you outlined in your letter mentions twenty referrals from whom six will be selected by the seller for the same special treatment that the buyer is getting. Other plans utilize different numbers, but the pattern is generally the same. Ignoring the fourteen who are not selected for participation in the advertising plan and starting from a basic number of six who must buy in order for the promises to the initial participant to be fulfilled, we find that the second "generation" of buyers will involve thirty-six persons. In order for the plan to be consummated as to them and for the commissions to continue as promised to the initial participant, the salesman must then persuade 216 persons to enter into the program. The number of sales that must be made in succeeding rounds for the plan to continue to reward the participants is as follows:

Fourth Round:	1,296
Fifth Round:	7,776
Sixth Round:	46,656
Seventh Round:	279,936
Eighth Round:	1,679,616
Ninth Round:	10,077,696
Tenth Round:	60,466,176



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Examination of the foregoing figures reveals the practical impossibility of fulfillment of the promises made to the individual participants. For the plan to work as represented by the seller, at some point prior to completion of the eighth round a number of new sales equal to the entire population of the City of St. Louis would have to be made. In order for the plan to continue successfully through the tenth round, new sales would have to be made to a number roughly equivalent to twice the entire population of Missouri, Illinois, Iowa, Kansas, Arkansas, Tennessee and Kentucky. And this is exclusive of any consideration of the astronomical number of persons who would already be participating in the program.

Moreover, many such plans start from a basic number of twenty or even thirty sales, rather than the six mentioned above, in the first round. In such cases, the progression is obviously much more rapid.

Considered in this light, some plans might well be said to possess the element of chance as they progress through their more advanced stages. The saturation which is the necessary effect of the operation of such plans might, at some point, make it a matter of the purest chance for a person to be found who was not already participating. Under these circumstances, the element of chance might be provided by the saturation aspect alone. However, in the instant case, other factors are present which make this determination unnecessary.

Rather, we believe that the element of chance is provided by the complete absence of any control on the part of the buyer over the operation of the plan after he signs the promissory note. For example, it is the salesman that selects the six names of prospective participants from the twenty names submitted, if, indeed, a selection is made. Whether the prospects, if a selection is made, are ever contacted is up to the salesman, not the person who has submitted the names. Whether the prospects submit to sitting through the sales talk or demonstration and whether they ultimately buy whatever merchandise may be involved are matters totally beyond the control of the original buyer.

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The uncertainty is multiplied as the scheme progresses into subsequent "generations", for the original participant's success is then made to depend not only upon the acts of the salesman with regard to the participant's list of names, but also upon whether or not lists are submitted by subsequent buyers. The probability that the plan will develop as represented is then a matter completely out of the hands of the initial participant and totally subject to the whims and caprices of agencies beyond his control.

It is this uncertainty concerning the acts of others and the lack of control over subsequent events which, we believe, supplies the necessary element of chance. In *State v. Hughes*, supra, wherein the prize was the early allotment of a low-interest loan from an unincorporated association, our Supreme Court found that the element of chance inhered in the impossibility of the participant to know when the money for his loan would become available. At page 231, the Court said:

"The uncertainty in respect to the order in which the certificate will become eligible for a loan is the thing which introduces the element of chance into the plan of distribution. It cannot be resolved by reason or on probabilities, but depends upon conditions such that the applicant cannot know when he signs whether many or few applicants are ahead of him and whether, therefore, he is to receive a loan early or late."

It is submitted that the same type of uncertainty exists in the instant case, for it is equally impossible for a participant in a referral selling scheme to know whether the salesman will actually attempt to sell to the persons on his list, whether any sales will be made, whether subsequent purchasers will cooperate by providing further references, or whether such references will spawn further sales.

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Such dependency upon acts of others over whom the participant had no control was held in *New v. Tribond Sales Company*, (C.A., Distr. of Columbia, 1927) 19 F.2d 671, to supply the necessary element of chance in constituting a referral selling scheme a lottery where the Court said, l.c. 674:

"It is apparent, we think, from what we have said, that whether a 'contract' holder will get his hosiery for an investment of \$1, \$5, \$8, or \$10, depends upon contingencies largely beyond his control. First, there is the requirement that the three 'respective purchasers' to whom he sells the three coupons will in turn remit \$3 each to the corporation for three other 'contracts.' These coupon purchasers may, upon inquiry, ascertain that others are trying to sell coupons, and they may, for this or some other reason satisfactory to them, conclude to forfeit the \$1 paid for the coupon and abandon the scheme. Obviously this is a matter beyond the control of the original 'receipt holder,' and, as to him, a matter of chance. \* \* \*"

Moreover, the classic "endless chain" scheme has been denominated a lottery by many courts, including the Supreme Court of the United States, for the same reason. The "endless chain" scheme is one which may be spread by letter or by word of mouth. Under usual terms of such a plan, a participant accepts a list containing a number of names from an earlier player. The new participant is required to give or send some consideration (which may be a savings bond, a ten dollar bill, or a ten cent piece) to the name which appears on the top of his list. This top name is then stricken from the list, and the new participant makes up a number of new lists equal to the number of names on the old. In the new lists, the name that was in the second position is advanced to the top position and the new participant's name is inserted at the bottom.

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The new participant then recruits new members, each of whom is given a list and each of whom passes on the required consideration to the name on top of the lists. The new recruits then advance all names one notch after striking the name on the top and insert their names on the bottom. At this point, the name of the first participant mentioned above advances to the second position from the bottom. The plan progresses with a type of saturation similar to that discussed above. If all subsequent participants perform as the first, preparing and distributing lists, his name will ultimately appear as the first name on hundreds or thousands of lists (depending on the basic number employed from the beginning) and he will become the recipient of the consideration paid upon entry into the plan by all new recruits.

The uncertainty of performance by subsequent participants over whom prior participants have no control has provided the element of chance necessary to characterize endless chain schemes as lotteries; and it is submitted that the same contingencies exist in the referral selling plans with which we are here concerned. In *Public Clearing House v. Coyne* (1904) 194 US 497, 515, 24 S.Ct. 789, 48 L.Ed. 1092, 1101, the Court said of a plan which, true to "endless chain" fashion, rewarded its members in direct proportion to the number of new members who entered the plan:

"It is true, as urged by the counsel for complainant, that in investing money in any enterprise the investor takes the chance of small profits, or even of failure, as well as the hope of large profits; but such enterprises contemplate the personal exertions of the investor, or of his partners, agents, or employees, while in the present case his profits depend principally upon the exertions of others, over whom he has no control, and with whom he has no connection. It is in this sense the amount realized is determinable by chance."

Honorable Daniel P. Reardon, Jr.

Furthermore, this office held in an opinion issued to Hon. Franklin T. Thackery under date of December 17, 1957, that an "endless chain" scheme involving United States savings bonds was a lottery because the possibility of a given participant's name rising to the top of the list (which theoretically would result in his receiving \$19,200.00 worth of bonds as a return for his initial investment of \$37.50 to get into the plan) depended solely on the diligence of those who would later join the plan to sell new memberships. On page 6 of that opinion, the following appears:

"In your factual situation, the participant, by his own efforts, may be successful in reducing his financial investment in the scheme to nothing, depending upon his own ability as a salesman. Yet, the amount which he will receive in return for his efforts, indeed whether he will receive anything, depends upon the success and willingness of those who come after him in keeping the chain unbroken until his name reaches the top of the list. Since these are people over whom he has no control, this constitutes chance according to all the authorities we have been able to find."

We therefore believe that the element of chance is present in the instant case and that the referral selling schemes discussed above are lotteries as prohibited by our constitution and as condemned by Sections 563.430 and 563.440, RSMo 1959.

#### CONCLUSION


On the basis of the foregoing authorities, it is the opinion of this office that a referral selling scheme whereby the reward to the initial buyer depends upon the success of the efforts of the promoter of the plan to sell

Honorable Daniel P. Reardon, Jr.

to persons to whom he is referred by the initial buyer or subsequent participants constitutes a lottery under Missouri law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours

  
THOMAS F. EAGLETON  
Attorney General



INSURANCE:

Articles of Incorporation of  
Old Reliable Insurance Company.

February 4, 1963



Honorable Jack L. Clay  
Superintendent of the  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Clay:

Pursuant to your request of January 31, 1963, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Old Reliable Fire Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1959, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

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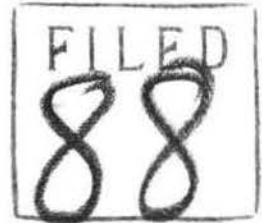
THOMAS F. EAGLETON  
Attorney General

JLO'M:lt

March 11, 1963

OPINION NO. 88 ANSWERED BY LETTER

Honorable J. R. Fritz  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri



Dear Mr. Fritz:

This is in response to your recent request for an opinion of this office concerning the salary of the Treasurer of Pettis County for the term of office from January 1, 1959, to December 31, 1963.

In an opinion issued to the Honorable G. B. Stewart on January 26, 1961, this office held:

"(1) that a change in population resulting from the 1960 census requires a change in the compensation payable to County officers whose salary is fixed in relation to such population by a statute in force as of the date of any such officer's election, and this is true whether the result be an increase or a decrease in the amount payable to such officers; and (2) that the 1960 census became effective for the purpose of ascertaining the salary of such county officers as of January 1, 1961, but that as to any officer whose salary is fixed on an annual basis and whose term began on a date other than January 1, any such change in compensation is not effective until the commencement of the next year of such officer's incumbency which begins subsequent to January 1, 1961."

A copy of that opinion is enclosed herewith.

Applying those principles to the instant problem, we turn to the formula in effect in counties of the third class (of which Pettis is one) on January 1, 1959, the

day upon which the treasurer in question took office. That formula appears in Section 54.260, RSMo 1949; and, since the 1950 census showed the population of Pettis County to be 31,577, the first portion thereof relevant to the instant question is that which reads:

"The county treasurers in counties of the third class of this state, . . . , shall receive for their services annually, . . . the following sums: . . . in counties having more than thirty thousand inhabitants but not more than thirty-five thousand, the sum of two thousand seven hundred and fifty dollars; . . ."

Hence, the annual salary of the treasurer in question for the years 1959 and 1960 should have been that amount.

The 1960 census showed an increase in the population of Pettis County from 31,577 to 35,120, thus placing Pettis County in the next higher bracket of Section 54.260, supra, which reads as follows:

". . . in counties having more than thirty-five thousand inhabitants but not more than forty thousand, the sum of three thousand two hundred dollars, . . ."

Under the terms of the previous opinion of this office referred to above, such a change does not violate the constitutional prohibition against increases of compensation of public officers during their term of office. Thus, the annual salary of the Pettis County Treasurer for the years of 1961 and 1962 should have been three thousand two hundred dollars.

We are aware of the fact that the formula used to determine the salaries of treasurers of counties of the third class was revised by both the 70th and 71st General Assemblies. Both of these revisions took effect during the term of office of the treasurer in question. However, since each would have had the effect of increasing the compensation of the treasurer (See Laws 1959, S.B. 66, section 1 and Laws 1961, p. 289, section 1), neither revision could affect his salary. For, as was discussed

Honorable J. R. Fritz

-3-

March 11, 1963

at length in the Stewart opinion attached herewith, where a public officer's salary is determined by a statutory formula in effect when he takes office, that formula is applied throughout his term rather than a subsequently enacted formula which would have the effect of increasing the salary.

We trust that the foregoing will be of assistance to you in answering the question stated in your letter.

Very truly yours

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THOMAS F. EAGLETON  
Attorney General

AJS:im

TAXATION:  
CONSOLIDATION OF MUNICIPALITIES:  
CITIES, TOWNS AND VILLAGES:  
REFUND OF TAXES:

After consolidation of two municipalities, the governing body has no authority to make any distinction with respect to liability for taxes thereafter levied between residents of the two former municipalities and may not

legally forgive the payment or refund taxes so levied to the residents of one of such former municipalities.

March 22, 1963

OPINION NO. 90



Honorable E. J. Cantrell  
Representative, Sixth District  
St. Louis County  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Cantrell:

We have your request for an opinion concerning the power of the City of Overland to refund certain taxes to the former inhabitants of the Village of Meadowbrook Downs. The facts, as they are stated in the papers forwarded to us are as follows:

Acting under the authority of Chapter 72, RSMo Cum. Supp., the City of Overland and the Village of Meadowbrook Downs, on April 3, 1962, by an affirmative majority vote of each municipality, consolidated under one government, the name of the municipality as consolidated being City of Overland. As a result of the consolidation, all of the records, moneys and properties of the former Village of Meadowbrook Downs were turned over to the consolidated City of Overland. Thereafter on June 28, 1962, the consolidated City of Overland enacted a budget ordinance and a tax ordinance for the ensuing fiscal year which began July 1, 1962.

The question raised by your request is whether the consolidated City of Overland may validly refund to the residents of the former Village of Meadowbrook Downs taxes levied and collected by the consolidated City of Overland pursuant to the authority of the ordinance of June 28, 1962, on the theory that the "assets" of such former municipality were in excess of the amount of such taxes. In our opinion this question must be answered in the negative.

Honorable E. J. Cantrell

Although it is true that the "assets" of the former Village of Meadowbrook Downs were transferred by operation of law to the City of Overland, the city which became the owner thereof was not the former City of Overland, but the new city resulting from the consolidation. Thus, it is equally true that the "assets" of the City of Overland were transferred by operation of law to the new consolidated City of Overland. In 62 C.J.S., Municipal Corporations, Section 77, page 186, it is said:

"On the consolidation of two or more municipalities, their property passes to the consolidated municipality."

And in 62 C.J.S., § 70, pages 181-182, it is said:

"Ordinarily, where two or more municipal corporations are combined, the resulting corporation includes the persons and places of the several municipalities, has the same property, as discussed infra § 77, and owes the same debts, as considered infra § 78, which they all had and owed, and the identity of the component elements is lost and becomes absorbed in the new creation."

In State ex rel. Consolidated School District v. Smith, 121 SW2d 160, 1.c. 163, our Supreme Court held with reference to a consolidated school district:

"Upon consolidation the identities of the component districts fade and disappear completely and in their stead emerges a new entity in the form of the consolidated district. This new entity spontaneously becomes the owner of the properties and liable for the old debts."

Thus it is clear that after a consolidation of two municipalities has been consummated all of the taxpayers of such new consolidated municipality are entitled to the benefits resulting from the consolidation and therefore must bear the burdens. If either of the former entities had a large indebtedness, the burden of discharging this indebtedness would fall upon all taxpayers without regard to which entity created the debt. So, too, the assets of each of the former municipalities enure



Honorable E. J. Cantrell

to the benefit of all of the residents and taxpayers of the new consolidated municipality. From and after the effective date of the consolidation, all residents of the new consolidated municipality stand on equal footing. Whether the benefits to be derived from the consolidation are sufficient to compensate for the burdens is a matter which was determined by the voters at the time of the election authorizing the consolidation. Having affirmatively voted to consolidate, the residents of neither of the former municipalities may now seek to avoid or be entitled to avoid any of the legal consequences of such consolidation.

In City of Westport v. McGee, 128 Mo. 152, 30 S.W. 523, the Court held that a statute exempting certain lands within the city limits violated the provision of Section 3, Article 10, of the Constitution of 1875 (identical in this respect to Section 3, Article X of the 1945 Constitution) that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," stating:

"The authority which levied this tax was the city of Westport. This real estate is in the same class with all other real estate in said city, and its owner is as much bound to bear his proportional part of the burden of supporting the government as any proprietor of real estate in said city."

Section 4(a) of the present Constitution authorizes the General Assembly to further classify personal (but not real) property, with the significant limitation that such classification may not be based on the "nature, residence or business of the owner", but must be based solely on the nature and characteristics of the property.

Section 6, Article X of the present Constitution lists property which is and may be exempt from taxation, and states: "All laws exempting from taxation property other than the property enumerated in this article, shall be void." In Life Association of America v. Board of Assessors of St. Louis County, 49 Mo. 512, it was held that similar provisions of a former Constitution could not be evaded by indirection (in that case, by commutation).

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In Long v. City of Independence, 229 SW2d 686, our Supreme Court expressly ruled that all property within the corporate limits when a tax is levied is subject to city taxes. That case, as the earlier case of City of Westport v. McGee, involved property annexed to the city after January 1, but before the tax was levied. Said the Court (229 SW2d, 1.c. 690):

"We restate the issue here as it was stated in the City of Westport case:  
'The question here is, were these lands within the corporate limits when the tax was levied? If they were, they are subject to city taxation.' Appellants' personal property likewise was taxable by the city if they were residents of the city when the tax was levied."

What is said in the foregoing cases applies with respect to annexed territory, but is equally applicable to a situation such as here present, namely, where the tax is levied by a new consolidated municipality after the effective date of the consolidation.

We also take note of Section 94.240, RSMo 1959, which expressly provides:

"The mayor and board of aldermen shall have no power to release any person from the payment of any tax, or exempt any person from any burden imposed by law."

#### CONCLUSION

It is the opinion of this office that the City of Overland may not validly refund to the residents of the former Village of Meadowbrook Downs taxes which were levied by the consolidated City of Overland subsequent to the consolidation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

May 27, 1963



Honorable Charles G. Hyler  
Prosecuting Attorney  
County of St. Francois  
Farmington, Missouri

Dear Mr. Hyler:

This is in response to your request for an opinion concerning the right of a member of the county court to continue in office who has been instrumental in purchasing road gravel for the county's use from a company owned and operated by his son. Specifically your question is:

"Does the purchase of material, to be used on a County road, by a County Judge, from a company owned and operated by his son, effect his right to remain in office under Article 7 Section 6 of the Missouri Constitution?"

The constitutional provision referred to is:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Apparently this provision of the constitution sheds no light upon the fact situation hypothesized. The facts which you set out do not constitute appointment to public office or employment.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

May 13, 1963



Honorable Joe R. Ellis  
Prosecuting Attorney  
Barry County  
Cassville, Missouri

Dear Sir:

This is in response to your request for an opinion as to the division of salary between your old Circuit Clerk/Recorder and the new one who took office January 7, 1963.

Specifically they each claim entitlement to the pay due for the first week in January. Obviously they cannot both be paid for the county is only liable to pay a specified amount annually to whoever holds the office.

The statutory amount established for the office merely fixes the rate of pay per annum and does not entitle the holder of that office to a full year's pay where he serves less than a year.

This means that the officeholder gets paid for the exact time that he is in office - no more, no less.

Surprisingly we find no law in this state upon the subject, perhaps because the practical solution set out above is universally accepted.

We are advised by the State Comptroller that this is the manner in which the pay is divided between the incoming and outgoing Governors.

Very truly yours,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

HLM:BJ

CRIMINAL EXTRADITION:  
WRITTEN WAIVERS OF:  
HABEAS CORPUS APPLICATIONS:  
MAGISTRATE COURT MAY TAKE, WHEN:

1. As judge of a court of record, a magistrate may accept written waiver of criminal extradition, when the accused executes or subscribes waiver in presence of magistrate, as provided by Section 548.260, RSMo 1959. 2. One arrested on governor's rendition warrant, when taken before magistrate, in accordance with Section 548.101, RSMo 1959, informs magistrate of desire to test legality of his arrest; magistrate shall fix reasonable time for application for habeas corpus. Application in first instance shall be made to circuit judge of county where accused is in custody, as provided by Section 532.030, RSMo 1959. If circuit judge is out of county and statement of unavailability of such judge is in application, such application may then be made to a magistrate of same county, who shall determine if habeas corpus shall or shall not be issued.

OPINION NO. 94.

July 3, 1963

Honorable Lawrence F. Gepford  
Prosecuting Attorney  
415 East 12th Street  
Kansas City 6, Missouri



Dear Mr. Gepford:

This office is in receipt of your request for a legal opinion which reads in part as follows:

"Do the words, 'judge of a court of record' also mean magistrates?

"Do the magistrates have the power under Section 548.260 to accept written waivers of extradition?

"Under Section 548.010, can the magistrate inform the accused person of demand made for his surrender and of the crime with which he is charged, etc. . .?"

Our research fails to disclose any statutory definition or appellate court decisions defining the term "judge of a court of record" referred to in the opinion request.

In the case of *State v. Crawford*, 295 P.2d 174, it was held that a "judge" is one who conducts or presides over a court of justice.

The terms "judge of a court of record" are defined in C.J.S., Vol. 48, p. 948, as follows:



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"A judge authorized by law to hold a court which is a court of record is a judge of a court of record."

Section 482.010 (1), RSMo 1959, provides for the election of magistrates at the general election of 1946, and every four years thereafter, who shall hold office for a term of four years, or until their successors are elected and qualified or appointed, commissioned and qualified.

Subsection (2) of Section 482.010, RSMo 1959, is in regard to the number of magistrates in each county, and reads as follows:

"In counties of thirty thousand inhabitants or less the probate judge shall be the judge of the magistrate court. In counties of more than thirty thousand and not more than seventy thousand inhabitants there shall be one magistrate. In counties of more than seventy thousand and less than one hundred thousand inhabitants there shall be two magistrates. In counties of one hundred thousand inhabitants or more there shall be two magistrates and one additional magistrate for each additional one hundred thousand inhabitants, or major fraction thereof."

From the provisions of Section 482.010(2), supra, the words "magistrate" and "judge of the magistrate court" have been used interchangeably, as referring to the judge who is authorized to preside over a magistrate court.

Section 476.010, RSMo 1959, names the courts which are courts of record in Missouri, and reads as follows:

"The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the existing courts of common pleas, the magistrate courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Section 517.050, RSMo 1959, also provides that magistrate courts shall be courts of record.



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From the foregoing it is readily seen that a magistrate court is a court of record and that the judge or magistrate who presides over said court is a judge of a court of record.

Therefore, our answer to the first inquiry of the opinion request is in the affirmative.

The second inquiry of the opinion request reads as follows:

"Do the magistrates have the power under Section 548.260 to accept written waivers of extradition?"

Section 548.260, RSMo 1959, referred to in the second inquiry of the opinion request, reads as follows:

"1. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 548.071 and 548.081 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in section 548.101.

"2 If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure

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or to limit the powers, rights or duties  
of the officers of the demanding state  
or of this state." (Underscoring ours)

Sections 548.071 and 548.081, RSMo 1959, referred to in the above quoted section, are in regard to the governor's rendition warrant, its issuance, recitals and the place of execution of the warrant, respectively.

Section 548.260, supra, provides that one charged with the commission of a crime in another state may waive the issuance and service of the governor's rendition warrant, as well as other procedure incidental to the extradition of the accused person.

From that portion of Section 548.260, supra, we have underscored, it appears the written waiver of the issuance of the rendition warrant, its service, and formal extradition proceedings by the accused, shall be executed or subscribed by him "in the presence of a judge of any court of record within this state \* \* \*", without making a requirement this shall be done before a judge of a particular court of record, and no other. Since there is no such limitation found in said section, the accused may make the waiver before the judge of any court of record in this state which may be available to him for that purpose, or if more than one judge is available at the time the accused wishes to make the waiver, then he can make such waiver before the judge of the court of record he or his attorney may choose.

We have previously pointed out that a magistrate, is a judge of a court of record in Missouri, and such judge is a judge of a court of record, within the meaning of Section 548.260, supra. One arrested in Missouri, who is accused of a crime in another state, or who is alleged to have escaped from confinement, or broken the terms of his bail, probation or parole, may waive the issuance and service of the governor's rendition warrant, and other procedure incidental to such person's extradition, by executing or subscribing a waiver of all such formal procedure, in the presence of the judge of a magistrate court.

Our answer to the second inquiry of the opinion request, is in the affirmative.



Honorable Lawrence F. Gepford

The third inquiry of the opinion request reads as follows:

"Under Section 548.010, can the magistrate inform the accused person of demand made for his surrender and of the crime with which he is charged, etc. \* \* \*?"

There is no Section 548.010, RSMo 1959. It is believed Section 548.101, RSMo 1959, is the one you intended to refer to in the third inquiry, as some of the provisions of said section are mentioned in this inquiry. We shall therefore treat the inquiry as if it were in regard to Section 548.101, RSMo 1959. Said Section 548.101, reads as follows:

"No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state." (Underscoring ours)

After issuance and service of the governor's warrant in accordance with provisions of Sections 548.071 and 548.081, the arresting officer cannot surrender custody of the person arrested to the agent of the demanding state until after the provisions of Section 548.101, supra, have been complied with. Said section provides that a person arrested upon such warrant shall not be delivered to the agent of the demanding state unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform the accused person of the demand made for his surrender, the crime charged and of his right to procure legal counsel. If said person



Honorable Lawrence F. Gepford

or his counsel inform the judge of this, or their desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time within which application for a writ of habeas corpus may be made.

In view of the fact that the judge of a magistrate court is a judge of a court of record, the arresting officer may take the accused before a magistrate judge in pursuance of the provisions of Section 548.101, supra. The judge of such court may perform all of the duties to be performed by a judge of a court of record mentioned therein except that an application for a writ of habeas corpus cannot in the first instance be filed and acted upon by the magistrate in the absence of a showing of certain existing facts or circumstances at the time of the filing of the application, which will be presently noted.

In this connection, we call attention to two opinions of this office, the first of which was written for Honorable H. A. Kelso, Prosecuting Attorney of Laclede County, Missouri, on July 23, 1946, and concluded that a magistrate court has jurisdiction to issue a writ of habeas corpus, a copy of which opinion is enclosed.

The second opinion of this office, to which we refer, was written for Honorable O. Hampton Stevens, Assistant Prosecuting Attorney of Jackson County, Missouri, on October 8, 1951. While the writer of said opinion agreed that a magistrate court might issue a writ of habeas corpus, and referred to the Kelso opinion, the writer entered into a more detailed discussion which in effect modified the holding in the earlier opinion. A conclusion was reached in the latter opinion that an application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that an application for habeas corpus to a magistrate should state the unavailability of a circuit judge for the purpose of entertaining the application, a copy of which is enclosed. In reaching the conclusion, the writer quoted in the body of his opinion, and relied upon Section 532.030, RSMo 1949, (now Section 532.030, RSMo 1959), which requires that an application for writ of habeas corpus, by one in custody charged with crime or misdemeanor, shall be made in the first instance to the judge of the circuit court of the county in which the applicant is in custody, if, at the time of the application such (circuit) judge be in the county, except that in the city of St. Louis, the application, in the first instance shall be made to the judge of the St. Louis Court of Criminal Correction, if at the time of the application he shall be in the city.



Honorable Lawrence F. Gepford

It is believed the above-mentioned opinions, and particularly the second, as well as Section 532.030, RSMo 1959, are fully applicable to the factual situation involved in the third inquiry, except that portion of Section 532.030, requiring applications for habeas corpus to be made in the first instance to the St. Louis Court of Criminal Corrections, which does not apply to such inquiry (as the opinion request does not concern applications for a writ in St. Louis City).

Upon his appearance before the judge of a magistrate court, if the accused person or his attorney inform the judge of his or their desire to test the legality of the arrest of the accused, under the governor's rendition warrant, said judge shall fix a reasonable time within which an application for a writ of habeas corpus may be made. Under provisions of Section 532.030, RSMo 1959, the application shall be in the first instance made to a circuit judge of the county in which the accused is held in custody. However, if no circuit judge is in the county, the application may then be made to the judge of any magistrate court of the same county, if a statement as to the unavailability of a circuit judge appears in the application. The magistrate shall in such a situation perform the duties imposed upon him by Section 548.101, supra. From the evidence offered at the hearing, the magistrate shall determine whether to issue or to deny the issuance of a writ of habeas corpus.

#### CONCLUSION.

Therefore, it is the opinion of this office that a magistrate, as a judge of a court of record in this state, is authorized to accept a written waiver of criminal extradition from one charged with crime in another state, when the waiver is executed or subscribed in the presence of said judge in accordance with the provisions of Section 548.260, RSMo 1959.

It is further the opinion of this office that when one is arrested upon the governor's rendition warrant and taken before the judge of a magistrate court in pursuance of the provisions of Section 548.101, RSMo 1959, and the accused informs the judge of his desire to test the legality of his arrest, said judge shall fix a reasonable time within which application for a writ of habeas corpus may be made. Said application in the first instance shall be made to a circuit judge of the county in which the accused is held in custody, in accordance with provisions of Section 532.030, RSMo 1959.

Honorable Lawrence F. Gepford

In the event a circuit judge is not present in the county to whom the application can be made, and a statement of the unavailability of a circuit judge appears therein, said application may then be made to the judge of a magistrate court of the county in which the accused is held in custody. Said judge shall have jurisdiction of the application and determination as to whether a writ of habeas corpus shall be issued or denied.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

PNC:jh



INCOME TAX:  
BANK TAX:  
NATIONAL BANKS:  
DIVIDEND CREDIT:

The payment of the seven per cent Missouri Bank Tax by a national bank is not a basis for allowing the dividend credit provided in Section 143.180, RSMo 1959.

OPINION NO. 95

October 3, 1963

Honorable M. E. Morris  
Director  
Department of Revenue  
Jefferson City, Missouri



Dear Mr. Morris:

This is in answer to your opinion request relative to an interpretation of Section 143.180, RSMo 1959. Your opinion request reads as follows:

"Section 143.180 RSMo 1959 provides for credit to stockholders on dividends received from corporations which paid income tax to the state of Missouri for their last preceding taxable period.

"This section also provides '...that stockholders of national banking associations shall be entitled to such credit computed as aforesaid but as if the national bank whose dividends are included in the stockholder's return was in fact a bank organized under the laws of this state and had paid income tax for which it would in such case have been liable for its last preceding taxable period.'

"A taxpayer has presented the following interpretation of Section 143.180.

Honorable M. E. Morris

'Under the "Bank Tax Law of 1946", which is found in Sections 148.010 to 148.110 of the Revised Statutes of Missouri, a tax is levied on national banks in Missouri which is a tax on the income of the banks. The tax levied is seven per cent of the net income of the bank for the preceding year. . .

'Since this national bank did pay to the State of Missouri the taxes specified by the State on its net income for the calendar year in question, whether you call it an income tax or not, on what basis do you say that the payment of that income tax as specified under the Bank Tax Law of 1946 does not qualify the recipient of dividends from the corporation for the dividend credit on the Missouri Individual Income Tax Return?'

"Please give us your opinion as to whether or not payment of the seven percent Missouri Bank Tax is basis for allowing the dividend credit provided in Section 143.180."

Initially, the states cannot tax national banks, their property or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation. *Des Moines Bank vs. Fairweather*, 263 U.S. 103, 106. The taxing authority of the states is limited by the restrictions placed on it by the national Congress. *First National Bank vs. Anderson*, 269 U.S. 341, 347. *General American Life Insurance Company vs. Bates*, 249 SW2d 458, 465. *Buder vs. First National Bank*, 16 F2d 990, 992.

Section 548 of Title 12 U.S.C.A. was amended in 1923 and 1926 to enlarge the authority of the states to tax national banks in the following language:

Honorable M. E. Morris

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause. . ."

(Subdivision (c) permits states to tax dividends received by shareholders of national bank stock on a nondiscriminatory basis.)

In conformity with the above Federal legislation, the State of Missouri enacted Chapter 148, RSMo 1959, entitled Taxation of Financial Institutions. Section 148.030 of this chapter provides:

"1. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) as provided in 12 U.S.C.A., section 548, and every other banking institution shall be subject to an annual tax for the privilege of exercising its corporate franchises within the state according to and measured by its net income for the preceding year."

The tax imposed under this section on financial institutions is upon both state and national banks.

It is to be noted that the Missouri Legislature, when it enacted Section 148.030, RSMo 1959, rejected the alternative provided by the Congress in taxing "(3). . .such associations

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on their net income", and instead specifically elected to subject such institutions to an annual tax "according to and measured by its net income. . .in accordance with method numbered (4) as provided in 12 U.S.C.A., section 548". Section 148.030, RSMo 1959. The only conclusion that can be drawn is that the State Legislature did not wish to impose an income tax under the authority granted it by 12 U.S.C.A., and instead imposed an annual tax measured by net income. In re Armistead, 362 Mo. 960, 245 SW2d 145, 152.

It also follows that having made the election under 12 U.S.C.A., section 548, the State of Missouri was then unable to impose an income tax on national banks as this would be in violation of 12 U.S.C.A., section 548 1(a). On the other hand, banks chartered by the state do not enjoy this status. Consequently, in addition to the bank taxes imposed under Chapter 148, RSMo 1959, according to and measured by their net income, state chartered banks must also pay income taxes under Chapter 143, RSMo 1959.

After the enactment of Chapter 148 taxing financial institutions, the legislature, in 1957, amended Section 143.180, RSMo 1959, which provides for dividend credits to contain the following language: (The added language in the 1957 revision is underlined.)

"For the purpose of this chapter, the tax on income included in the return of any stockholder of any corporation, joint stock company and/or joint stock association, received or earned during the taxable period, shall be credited with the amount obtained by multiplying the rate of the Missouri state tax on corporate income by the amount or portion of such dividends, or net earnings of any corporation, joint stock company and/or joint stock association upon which such corporation, joint stock company and/or joint stock association, paid income tax to the state of Missouri for its last preceding taxable period, provided, however, that stockholders of national banking associations shall be entitled to such credit computed as aforesaid but as if the national bank whose dividends are included in the stockholder's return was in fact a bank organized under the laws of this

Honorable M. E. Morris

state and had paid income tax for which it would in such case have been liable for its last preceding taxable period. Whenever the withholding for, or payment of, at the source, any tax on income under any law of this state, be authorized by any law of this state, then a like credit shall be allowed to the extent of the amount so withheld or paid on account of such taxpayer claiming such credit."

The shareholders of national banking associations prior to the 1957 revision of Section 143.180, RSMo 1959, could not be entitled to any dividend credit for the reason that national banks did not pay income tax to the State of Missouri--the only basis of computation of such dividend credits which was allowed under this section. However, after the 1957 revision, Section 143.180, supra, allowed shareholders of national banking associations to obtain a dividend credit ". . . computed as aforesaid but as if the national bank whose dividends are included in the stockholder's return was in fact a bank organized under the laws of this state and had paid income tax. . . ." The whole effect of this additional language was to put shareholders of national banks in the same (but no more) favorable position as shareholders of state banks for the purposes of the dividend credit provisions of Section 143.180, RSMo 1959. This interpretation is fully born out by the concluding language in the 1957 revision of Section 143.180, supra.

" . . . and had paid income tax for which it would in such case have been liable for its last preceding taxable period."  
(Emphasis supplied)

"Such case" as used in the revision could only apply to the situation as it would be if the national bank were a state bank and, therefore, had paid income tax upon which a dividend credit could be computed. The net effect of the 1957 revision clearly recognizes that unlike state banks, national banks do not pay income taxes which form the basis of the computation of dividend credit under Section 143.180, supra, but nevertheless, allows shareholders of national bank stock to compute their dividend credit on the same basis as shareholders of state bank stock.



Honorable M. E. Morris

To interpret this section as the taxpayer contends would be to allow shareholders of national bank stock a dividend credit based upon the seven per cent bank tax, and at the same time, limit shareholders of state bank stock (which also pay the seven per cent bank tax) to a dividend credit based upon the two per cent tax provided in our income tax statutes. This construction might well be in violation of Article X, Section 3 of the Missouri Constitution 1945, providing:

"Taxes. . .shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

#### CONCLUSION

It is the opinion of this office that the payment of the seven per cent Missouri Bank Tax is not a basis for allowing the dividend credit provided in Section 143.180, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert D. Kingsland.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

RDk:bj

March 7, 1963



Honorable Charles D. Trigg  
Comptroller and Budget Director  
State Capitol  
Jefferson City, Missouri

Dear Mr. Trigg:

We have your request for an opinion as follows:

"At the present time there is a balance of some \$25,000 in the Soldier's Bonus Fund. Would I, as State Comptroller, have authority to transfer this balance to the General Revenue Fund of the State?"

Section 44b, Article IV, was added to the Constitution of 1875 by an amendment adopted August 2, 1921. It authorized the issuance of \$15,000,000.00 in bonds for the purpose of paying a bonus to certain residents of the state who served with the military or naval forces of the United States during World War I.

Senate Bill 1, 51st General Assembly, Second Extra Session, was enacted to implement the foregoing constitutional amendment (Laws, 1921, Second Extra Session, page 6). Section 21 of that act provided that the money realized from the sale of the bonds shall be paid into the state treasury to the credit of the "Soldier Bonus Fund", out of which shall be made the disbursements authorized to be made by Section 44b, Article IV, of the Constitution. The act also provided for a tax to raise the money necessary to pay the principal and interest of the bonds. Another fund, designated "Missouri Soldiers Bonus Bond Interest and Sinking Fund", was created by the act into which the tax moneys were to be paid.

Another constitutional amendment adopted February 26, 1924 (Section 44c, Article IV, Constitution of 1875) authorized the issuance of an additional \$4,600,000.00 bonds for the purpose authorized by Section 44b, Article IV, and the foregoing act of the General Assembly. This amendment provided (with an exception relating to interest) that "All of the provisions of said act shall apply to and govern the issuance and payment of the principal of the bonds herein authorized and the disbursement of the proceeds thereof without further legislative action."

The act of 1921 provided that the application for a bonus thereunder must be filed on or before December 21, 1922. Re-enacting acts were passed from time to time extending the time for filing applications for the bonus, the last extension being to December 31, 1954. You have informed us that all applications have heretofore been finally acted upon and that there are no claims presently pending or which can now be paid out of the Soldier Bonus Fund. You have further informed us that all bonds issued under the authority of the foregoing constitutional provisions and the interest thereon have long since been paid and that there are no obligations presently existing against either of the above funds.

We have also been informed that the entire proceeds of both bond issues have been exhausted in the payment of the bonus claims. In 1955 the General Assembly directed that \$87,700.41 be transferred from the Soldier Bonus Interest and Sinking Fund and credited to the Soldier Bonus Fund (Laws, 1955, page 213, Section 13.170). There was then appropriated out of the State Treasury, chargeable to the Soldier Bonus Fund as thus replenished the sum of \$87,700.41 "or so much as may be needed to pay bonus claims" for the biennium and for prior years (Laws, 1955, page 213, Section 13.180). The present balance in the Soldier Bonus Fund is, therefore, the amount remaining, after payment of bonus claims, of the sum transferred from the Soldiers Bonus Interest and Sinking Fund.

In an opinion to Honorable Robert W. Winn, State Treasurer, dated November 17, 1937, this office gave its construction of what is now Section 33.080, RSMo. That section provides in part:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals of not more than thirty days be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the State by the state treasurer. \* \* \*

In the opinion to Mr. Winn this office listed various funds which should be transferred by the State Treasurer to the credit of the ordinary revenue fund and other funds which were excepted by the terms of the statute. Among the latter funds were the Soldier Bonus Fund and the Soldiers Bonus Interest and Sinking Fund. The reason that the latter funds were excepted was that they constituted funds which were collected and expended by virtue of the provisions of the then Constitution of this State.

The 1875 Constitution has been superseded by the 1945 Constitution. Section 1 of the Schedule specifically provides that:

Honorable Charles D. Trigg      -4-

"The Constitution of 1875 and all amendments thereto except as hereinafter provided shall be superseded by this Constitution."

We find no provision in the 1945 Constitution which requires that the balance in the Soldier Bonus Fund shall remain therein. We note that the entire balance therein consists of moneys appropriated by the 68th General Assembly for the purpose of paying bonus claims "for the biennium and for prior years." This purpose has been served and the appropriation has lapsed. It is our opinion, therefore, that by virtue of the provisions of Section 33.080, the moneys presently in the Soldier Bonus Fund should be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. We find no provision which would authorize this to be done by the state comptroller.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JN:lt



April 3, 1963



Honorable William J. Cason  
State Senator  
Senate Post Office  
Capitol Building  
Jefferson City, Missouri

Dear Senator Cason:

This is in answer to your letter of February 8, 1963, requesting an opinion of this office as to whether the registration laws found in Chapter 114, RSMo, apply to township, city, school or other special elections, as well as primary and general elections.

Chapter 114 provides the method and procedure by which the county court of any county may adopt a law (or repeal it) requiring a registration of qualified voters within the county. Section 114.240, RSMo Cum. Supp., provides:

"Elections covered by law.--This chapter shall not be construed to include elections other than state and county general, special and primary elections and municipal elections of all kinds in cities having more than four hundred thousand inhabitants."

By definition, the registration laws contained in Chapter 114 do not apply to municipal or city elections in cities of less than four hundred thousand inhabitants.

On March 26, 1953, in an opinion to the Hon. James J. Wheeler, Prosecuting Attorney of Chariton County, Keytesville, Missouri, this office held that absentee voting was

Honorable William J. Cason

- 2 -

April <sup>3</sup>~~2~~, 1963

not allowed at elections wherein only township officers are elected. Section 112.010, RSMo, provides for absentee ballots in "any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, \* \* \*." Under the doctrine of "expressio unius est exclusio alterius," which means that the express mention of one thing, person or place implies the exclusion of another, this office held Section 112.010 did not authorize the use of absentee ballots in township elections. A copy of this opinion is attached hereto.

However, any special election which requires statewide or countywide participation would be a state or county special election, and voters therein must be registered as required by Chapter 114.

For the same reason, it is our opinion that the coverage of Chapter 114 is limited by Section 114.240 to state and county elections, and does not include township or school elections.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JHD:sr

Enclosure

COUNTIES:  
COUNTY COURTS:  
COUNTY SURVEYORS:  
SURVEYORS:

County Court required to provide office space and supplies to County Surveyor; however, County Court determines adequacy of office and supplies provided.

June 10, 1963

OPINION NO. 101

Honorable William W. Hoertel  
Prosecuting Attorney  
Phelps County  
Rolla, Missouri



Dear Mr. Hoertel:

This is in response to your recent request for an opinion of this office concerning a letter which you have received from the present surveyor of Phelps County. The letter which accompanied your request, reads in part as follows:

"In Phelps County, as in many other places (counties of classes 2-3-4) it has been a common practice for the Court to pay the personal office expense of those officers who do not have, or use, rooms at the Court House - instead use their own business office. For years past, Phelps County Court has so paid the expense of offices outside the court house for prosecuting attorney, circuit judge, and the welfare department. To my knowledge, NO PHELPS COUNTY COURT has EVER provided or paid for an office, or office space - or for any of the furniture, appliances, or equipment absolutely required by the county surveyor.

"As of January 1, 1962, I requested Phelps County Court to pay me \$50 per month as rental for the adequate and convenient room space which I use as the County Surveyor's office in my residence basement. The Court paid \$50 for January, 1962, then refused other payment, and refused also to

budget the item. Refused also for the 1963 years.

"As of Feb. 1, 1962, the Phelps County Court DID offer an office at the Court House - but in my estimation the space was wholly unsuitable. AND THE COURT DID NOT, OFFER, and has never offered, to place in such an office the required FURNITURE, APPLIANCES AND EQUIPMENT. The Court assumed that I would move my PERSONAL furniture, appliances and equipment to the office the court offered. I REFUSED, and DO refuse to do this, as the Court House is a FIRE TRAP. My personal equipment would be open to the public, and would soon disappear and be carried off. Moreover, I have room in my yard for the necessary concrete monuments, stakes, steel pins, and room for painting the same that could not possibly be provided at the Court House. It would cost the Court something like \$6,000 to properly EQUIP such an office at the Court House, ....In view of the foregoing, will you kindly supply answers to these questions:

"(1) Do I have adequate legal basis for asking the Court to pay me the \$50 per month, since the Court has never offered to provide, with a suitable office, the necessary furniture, appliances and equipment to go with it?

"(2) Do I, as Phelps County Surveyor, have to provide, personally, all the appliances, furniture, and equipment - all the surveying instruments, steel tapes, sledges, picks, post hole diggers - and the drafting tools and tables, map filing cases, and truck for transport to my work in the field -- and still not be paid by the County



Court for so providing these things?

"(3) Is the Court obliged to pay me the \$50 per month for use of my basement office - and the equipment (as above) in it?"

At the outset we should note that Section 49.510, RSMo 1959, reads as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

We believe that it may reasonably be inferred from the foregoing statute that the office or office space which the county must provide must be adequate and adaptable to the purposes of the officer for whom it is provided. However, it is the county court which initially determines such questions of adequacy and suitability. As was said in *Buchanan v. Ralls County*, (1920) 283 Mo. 10, 222 S.W. 1002, 1004, wherein the suitability of office space provided to a county treasurer was in issue, "\* \* \* whether or not such room was a reasonably suitable room for respondent's use, under the circumstances, becomes a question of fact, unless, in the light of the evidence, the impracticability or unsuitableness of such an arrangement is so obvious that the minds of reasonable men could not honestly differ about it." It cannot be said from the facts recited in the above quoted letter that the space tendered to the surveyor is so grossly unsuitable that reasonable minds could not differ as to this conclusion.

Inherent in the county court's offer of office space in the instant case is its determination that the tendered space is adequate for the purposes of the surveyor. In



Bradford v. Phelps County (Mo. Sup. 1948) 210 S.W.2d 996, 1001, our Supreme Court displayed its unwillingness to overturn a decision of a county court in the following words:

"It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)."

Accordingly, this office will not undertake, in the circumstances of this situation, to determine that the county court erred in finding that the offered space is adequate. Therefore, we conclude that the surveyor must accept the space made available to him by the court or make his own arrangements for office space at his own expense.

The clear mandate of Section 49.510, supra, requires that the county provide the surveyor with necessary equipment and supplies for the performance of his duties. The particular items which would fall within this area may properly be determined by the county court with the advice of the surveyor.

It should be noted that several of the items mentioned in the request obviously could not be argued to fall within the items enumerated by Section 49.510. For example, the request mentions concrete monuments which would apparently be used as corner markers. Reference to Section 60.310, RSMo 1959, indicates that the perpetuation of corners is to be accomplished by reference to trees, "and when there are no trees within a reasonable distance, the surveyor shall perpetuate his corner by erecting mounds; and when practicable, he shall require the person having the survey made to furnish suitable stones, and at each and every corner made and established a stone shall be permanently placed in the ground, and in such cases it shall not be necessary to erect mounds." Therefore, although stone markers may be used at the expense of the person requesting the survey, the alternative to such type of marker is a mound constructed by the surveyor.

Honorable William W. Hoertel - 5

The request also inquires as to whether the county court would be obliged to provide a truck in which the surveyor would ride to his work with his equipment. Reference to Section 60.110, RSMo 1959, reveals that the surveyor is entitled to eight cents "For traveling to the place of survey and returning, for every mile." We believe this is indicative of a legislative intent inconsistent with the suggestion that the surveyor is entitled, as a matter of right, to be furnished with a vehicle.

#### Conclusion

It is therefore the opinion of this office that a county court of a county of the third class is required to furnish the surveyor of that county with an office or office space suitable to the functions of the surveyor. However, it is the county court, and not the surveyor, who determines the adequacy of the office provided. The county court is also required by Section 49.510, R.S. Mo. 1959, to provide supplies necessary to the operation of the office consistent with the provisions of Chapter 60, RSMo 1959.

This opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours,

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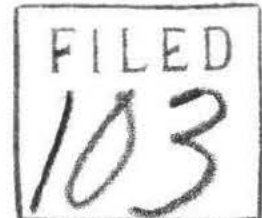
THOMAS F. EAGLETON  
Attorney General

AJS:im/df

COURTS: Judge of police court of a fourth class city  
JUDGES: must hear case arising out of occurrence  
RULE OF NECESSITY: which he witnessed where no provision made  
for substitute judge.

October 22, 1963

OPINION NO. 103



Honorable Don Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

We have your request for an opinion of this office as follows:

"One of my Magistrate Judges for Greene County has asked for my opinion in regard to the interpretation of Section 98.500 RSMo 59. It deals with the office of the Police Judge in the cities of the fourth class.

"The facts are as follows: A councilman is charged with fighting in the street with the Mayor. The Mayor entered a plea of guilty and paid a fine for fighting in the street. The councilman refused to pay a fine, and the City of Ash Grove charged the councilman with fighting in the street. The Police Judge disqualified himself because he was a witness in the case. All councilmen have disqualified themselves as possible police judges in the case at a regular meeting of the City Council. Under Section 98.500, the question is: Who would be a competent judge, authorized by law, to hear this case?"

Section 98.500, RSMo 1959, to which you refer, provides that cities of the fourth class may elect a police judge who shall have exclusive jurisdiction to hear and determine all

Honorable Don Burrell

offenses against the city ordinances. We note from the Blue Book for 1961-1962 that the City of Ash Grove is a city of the fourth class. It appears from your letter that the city has provided for the election of a police judge. However, it further appears that the police judge proposes to disqualify himself from hearing the case in question because he witnessed the occurrence out of which it arises.

Section 98.500 also provides that:

" \* \* \* in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

Obviously this provision cannot be applied in the present case inasmuch as the mayor was a party to the affray out of which the case arises.

It is therefore necessary to discover some authority of law for a judge other than the regularly elected police judge to hear a case involving violation of a municipal ordinance. In so doing, it is necessary to keep in mind the basic principle that the right to a change in judge is a creature of statute and does not exist in the absence of such authority. *Erhart v. Todd, Mo.*, 325 SW2d 750; *Browder v. Milla, Mo. App.*, 296 SW2d 502; *Sherwood v. Steel, Mo. App.*, 293 SW 798.

We find no statutes which provide for a substitute judge to hear a case arising out of the violation of an ordinance of a fourth class city. However, Supreme Court Rule 37.01, which relates to the disqualification of judges in municipal courts, does purport to deal with the situation. This rule is as follows:

"Whenever a judge is disqualified, said judge shall forthwith make an order transferring and removing the case to another judge authorized by law to hear such case."



Honorable Don Burrell

While the rule authorizes the transfer of the case to another judge authorized by law to hear such case, it does not specify the judge who is so authorized. We must therefore determine whether any provision of law vests in either the circuit or magistrate judge, or a municipal judge, jurisdiction over the subject matter, i.e., the violation of a municipal ordinance of this particular city.

Section 482.090, RSMo 1959, sets out the jurisdiction of magistrate judges. Without going into detail, it can be seen that the magistrate is limited to jurisdiction over certain matters, not including municipal ordinance violations.

By the same token, Section 478.070, RSMo 1959, which deals with the jurisdiction of circuit courts, does not grant original jurisdiction over municipal ordinance violations to circuit judges.

In terms of jurisdiction of the subject matter, it would appear that another municipal judge would be authorized by law to hear such a case. However, the territorial jurisdiction of an inferior court, such as the police court of a municipality, is limited to the boundaries of the city in which it exists. 48 C.J.S., Judges, Section 59. Therefore, since the judge of another municipal court would not be authorized by law to hear the case in question in the first instance, he would have no authority to hear such case on a transfer.

From the foregoing it can be seen that, although the Supreme Court has provided for the transfer of a case in a municipal court in the event of the disqualification of the judge of such court, the Court rule is qualified in that the judge to whom the case is so transferred must be one authorized by some other provision to hear the case. As we have pointed out, there is no authority at law granting jurisdiction over the subject matter to the judge of any other court. Thus we reach a hiatus in the law.

In such a situation, the well-established "rule of necessity" must be applied. A leading example of the application of this rule is found in *Evans v. Gore*, 253 US 245, 40 S.Ct. 550, 64 L.Ed. 887. In that case the United States Supreme Court was presented with a case involving the power of Congress to tax the salary of federal judges. The justices



Honorable Don Burrell

had an obvious interest in the outcome of the case inasmuch as its resolution would determine whether their own salaries were subject to such taxation. The court pointed this out but ruled that since no other court could render an authoritative decision on the issue it was incumbent upon the Supreme Court to place aside any personal interest and decide the case.

State ex rel. Mitchell v. Sage Stores Company, 157 Kan. 622, 143 P.2d 652, was a quo warranto action instituted by the Attorney General of Kansas to oust the respondent from doing business in the state of Kansas. Sometime after the institution of the suit and before it finally reached the Supreme Court of Kansas, the Attorney General, in whose name the action had been filed, was appointed to the Supreme Court of Kansas. When the case was heard it became necessary for the former Attorney General to participate in the decision, due to an equal division of the other judges of the court. On motion for rehearing it was contended that the former Attorney General should be disqualified. In ruling that it was proper for the judge in question to hear the case, the Supreme Court said (1.c. P.2d 656-657):

"While our previous cases, as the instant one, pertain to participation of justices who were not legally disqualified, it is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question properly presented to such court, adjudicated. Barber County Com'rs v. Lake State Bank [123 Kan. 10, 13, 254 P. 401]; Aetna Ins. Co. v. Travis [124 Kan. 350, 259 P. 1068]; Brinkley v. Hassig [10 Cir., 83 F.2d 351, 357].

"The rule is based upon what judges and text-writers frequently refer to as the Doctrine of Necessity. In the Barber County Com'rs case, we quoted the following statement from City of Philadelphia v. Fox, 64 Pa. 169, 185, with approval:

Honorable Don Burrell

"The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it may be."

See also Kennett v. Lavine, 150 Wash. 2d 212, 310 P.2d 244, and cases cited therein; Annotation 39 A.L.R. 1476.

#### CONCLUSION

Applying the rule of necessity to the question which you present, it is our view that, in the absence of any other judge authorized by law to decide the case involved, the regularly elected police judge of the City of Ash Grove should hear and determine the case despite the fact that he witnessed the occurrence out of which it arises.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JJM:ml

SCHOOLS:  
SCHOOL DISTRICTS:  
SPECIAL SCHOOL DISTRICTS:  
HANDICAPPED CHILDREN:  
ST. LOUIS COUNTY:  
INCAPACITATED CHILDREN:

Special school district for handicapped children must provide instructions for every child in school district, either by special school classes or free instruction course. Child may attend classes part-time if superintendent deems child is incapacitated.

February 15, 1963



Hon. Patrick J. O'Connor  
State Representative  
Room 301, Capitol Building  
Jefferson City, Missouri

Dear Mr. O'Connor:

We have your opinion request of February 5, 1963, which, in essence, raises a question as to whether under existing Missouri statutes a handicapped child in St. Louis County must attend one school the full time that school is in session, or whether the handicapped child can receive part-time, specialized training in one school and regular training in other schools or at home.

Secs. 165.740 through 165.780, RSMo 1959 deal with the Special School District for Handicapped Children in St. Louis County.

Before examining those sections, we must consider Missouri's compulsory school attendance law (Sec. 164.010) as well as certain other statutes in connection therewith.

With a few limited exceptions, it has long been the educational policy of this state as reflected in our laws (and the policy of many other states, for that matter) to require children between ages of 7 and 16 "to attend some day school, public, private, parochial or parish, not less than the entire time the school which the child attends is in session." Sec. 164.010.

The school day is defined by law as "six hours occupied in actual school work." Sec. 163.020.

In 1954, Attorney General Dalton ruled that the school day cannot be shortened for any particular pupil but that the pupil must attend for the full time that the school is in session.

February 15, 1963

Further, state aid is computed on the basis of "average daily attendance" as it relates to the "total number of days attended" by the pupils, not parts or portions of days. Sec. 161.021.

This, in summary, is the generally applicable law, namely, full-time, not part-time attendance at one given school for the entire school day.

However, there are certain exceptions to this full-time rule. There are exceptions for students who have outside employment or students who are receiving home instruction. Finally, there is the exception which is particularly relevant to the instant question and we quote this exception (Sec. 164.010 (1) ):

"A child who, to the satisfaction of the superintendent of schools of the district in which he resides or another person authorized to act for him, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof."

In order for this exception to apply, the superintendent of public schools of the district in which the child resides must determine that the child has some mental or physical incapacity because of which the child should be excused from attending the school in which he is then enrolled for the full time or for such part thereof as the superintendent shall specify.

Now, then, we consider Secs. 165.740 through 165.780 dealing with the Special School District for Handicapped Children in St. Louis County.

Sec. 165.740 (4) reads as follows:

"The special school district shall provide free instruction, classes, school or schools, for children under the age of twenty-one years, resident within the county, who are physically or mentally handicapped, including the blind or partially seeing, the deaf or hard of hearing, the crippled, and the mentally retarded or mentally deficient, who are capable of instruction or training, and for all other categories of physically or mentally handicapped children which are hereafter approved for special instruction by the state commissioner of education."

Honorable Patrick J. O'Connor - 3.

February 15, 1963

Under this statute, the classes and schools established by the special district must be available to all eligible resident children of the special district without discrimination. So, too, if the special district undertakes to provide special instruction to certain categories of handicapped children who are not enrolled in any class of the special district, it must provide such instruction at reasonable times and places to all eligible children in such category without discrimination, and may not refuse to provide such instruction solely because the child entitled thereto is not enrolled as a student in another public school district.

There is no prohibition in the Special School District Law against part-time classes if they should be deemed in the best interest of the children and would not involve a violation of the compulsory attendance law. Therefore, if the superintendent of the district in which a child resides makes a determination of incapacity in connection with Sec. 164.010 (1), and if the child is handicapped as defined in Sec. 165.740 (4), then the child may apply for admission to a special school, or class, or course of free instruction. This is not to say that the special district must devise a special program of instruction for each child, but that under the language of Sec. 165.740 (4), the special school district is obligated to do its reasonable best to accomodate such child's needs consistent with the resources and facilities of the special school district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General



Opinion request No. 113  
answered by letter (Northcutt)

February 28, 1963



Honorable Stephen H. Zeilmann  
Member, House of Representatives  
Osage County  
House Post Office  
Jefferson City, Missouri

Dear Mr. Zeilmann:

We have received your request for an opinion dated February 21, 1963, which reads, in part, as follows:

- "1. Does the term of office expire on March 1, or the first Monday in March?
- "2. Does the newly elected county collector take over his duties on March 1, or the first Monday in March?
- "3. What is the final date for the present county collector to cease collecting taxes?"

In regard to your first question as to the expiration of the terms of county collectors, Section 52.015, RSMo 1959, provides that the term of office of the county collector shall expire the first Monday in March.

In answer to question No. 2, as to when the newly elected county collector assumes his duties, he also will assume his duties on the first Monday in March, at which time the past county collector would turn over to him all accounts, records and other items pertaining to the office.

In your third question you ask what is the final date for the present county collector to cease collecting taxes.

Honorable Stephen H. Zeilmann    -2-    February 28, 1963

There is no provision in Chapter 52 pertaining to county collectors for them to cease collecting taxes at any specific time, therefore it is believed by this office that the final date for the collector to cease collecting taxes would be at the close of business hours on the final business day previous to his turning over the office to the newly elected and qualified county collector.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

ERN:sr

County Superintendent  
of Schools:  
Ballots:  
Elections:

An election must be held in Gasconade County on April 2, 1963 for the office of County Superintendent of Schools and it is the duty of the County Clerk of Gasconade County to cause sufficient ballots to be printed and delivered to the various school districts of the county; and this ballot should contain a place for write-in votes.

March 12, 1963

Opinion No. 115

Honorable Randolph E. Puchta,  
Prosecuting Attorney  
Gasconade County  
Hermann, Missouri



Dear Mr. Puchta:

This is in response to your request for an opinion dated February 25, 1963, which reads in part as follows:

"I would appreciate an opinion concerning the following problem confronting the County Clerks of Gasconade County in preparing for the coming election concerning the office of County Superintendent of Schools.

"All School Districts of Gasconade County have been fully reorganized for more than four years. The office of County Superintendent of Schools has been vacant for several years due to the policy of the Governor not to fill vacancies in Counties where school districts are completely reorganized.

"The County Clerks in preparing the form of Ballots for the April Election and the time for filing for candidates for County Superintendent has expired and no person has filed. Therefore, the problem remains; must the ballot contain the title of this officer and a place for write-in votes and if so must a person receiving a majority of write-in votes be recognized or duly elected if such person meets all qualifications, even though he had not filed for this office and even though no duties remain to be performed by this office in Counties which are completely reorganized."

In answering your questions we first call attention to Article VIII, Section 2 of the 1945 Constitution of Missouri which provides that "All citizens of the United States \* \* \* are entitled to vote at all elections by the people \* \* \*".

Section 167.010, RSMo 1959, provides for the qualifications and election of a county superintendent of schools and the first sentence of that section reads as follows:

"The qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. \* \* \*"

It is evident from this statute that there must be an election for the office of county superintendent of schools in Gasconade County on Tuesday, April 2, 1963. We are of the opinion that the election must be held regardless of whether any person has filed as a candidate for the office of county superintendent of schools.

Section 167.020, RSMo 1959, prescribes certain duties of the clerk of the county court and sets forth the form of the ballot. Pertinent portions of that section read as follows:

"1. \* \* At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the county clerk shall cause to be printed ballots with the names of the candidates who have filed declarations of their candidacy printed thereon in alphabetical order, said ballots to be substantially in the following form:

OFFICIAL BALLOT

Tuesday, April . . .19 . . .

For County Superintendent of Public Schools

(Vote for one by drawing a line through all names except the one voted for)

.....  
.....  
.....

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of the district \* \* \*. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to

see that each ballot so cast is counted for the person receiving the same, \* \* \*. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, \* \* \*.

"3. \* \* \* Any person, upon whom there is imposed an official duty by this chapter, and who shall violate any of the provisions herein, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment."

Section 165.330, RSMo 1959, deals with elections in school districts and makes similar provisions insofar as that section relates to the election of the county superintendent of schools. Section 165.330 reads in part as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, \* \* \*

\* \* \* \* \*

"3. \* \* \* provided, that in any year in which a county-superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, \* \* \*."

From the quoted portions of these statutes it is evident that the voters of the various districts are to vote for the office of county superintendent of schools by ballot. Section 167.020, RSMo 1959, makes it the duty of the clerk of the county court to cause the ballots to be printed and delivered to the various districts of the county.

We next deal with the question of whether a place must be provided on the ballot for write-in votes.

The case of Turpin v. Powers, 270 Mo. 338, was an election contest over the office of constable. In the concurring opinion of Graves, C. J., l. c. 349-350, the court said:



"\* \* \* In the instant case these 38 voters had the right to write under the caption 'For Constables, 4th District' the name of any person or persons that they desired to cast their ballot for at such election. This has been consistently ruled since *Bowers v. Smith*, 111 Mo. 1. c. 52, whereat we said:

'By our Constitution general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitled the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.'

"\* \* \* Each voter had the right to vote for himself for constable, if he so desired. He had the right to write his own name for that office under the caption for that office, \* \* \*."

Ever since the decision in the case of *Bowers v. Smith*, 111 Mo. 45, quoted and relied on in the case of *Turpin v. Powers*, it has been the recognized law in Missouri that a voter has the right to write on his ballot names other than those which may be printed thereon. We believe that this principle is applicable to an election for the county superintendent of schools.

In accordance with these authorities we are of the opinion that the ballot prepared by the county clerk for the election for the office of the county superintendent of schools should contain a place thereon sufficient to enable the voters at the election to enter the name of any person under the caption for that office for whom they desire to cast their ballot at such election.

Since we are of the opinion that write-in votes are proper in the election for the office of county superintendent of schools it follows from the portions of paragraph 2, Section 167.020, RSMo 1959, quoted above, that these votes should be counted and that the

county clerk must cast up the vote and issue a commission to the qualified person receiving the highest number of votes.

We do not make any ruling herein as to what the result might be if the requirements of the law were not followed in the manner we have pointed out, because that might well depend upon many additional factors which would affect the decision on the validity of the election. We are viewing this matter before the ballots are printed and before the election is held and we are of the opinion that the provisions of the statutes, as set out in this opinion, are mandatory in the sense that compliance with them could be enforced by a writ of mandamus.

#### CONCLUSION

It is, therefore, the opinion of this office that an election must be held in Gasconade County on April 2, 1963 for the office of County Superintendent of Schools and that it is the duty of the County Clerk of Gasconade County to cause sufficient ballots to be printed and delivered to the various school districts of the county; and that this ballot should contain a place for write-in votes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

WWW:mw-df

BARBERS:  
BARBER COLLEGES:  
BARBER SCHOOLS:

Section 328.120, RSMo 1959, requires that there be one instructor directly supervising the practical training of not more than ten students in a barber school or college.

OPINION NO. 117

May 3, 1963

Mr. Leon F. Burton  
Secretary-Treasurer  
State Board of Barber Examiners  
131 Capitol Building  
Jefferson City, Missouri



Dear Mr. Burton:

This is in response to your recent request for an opinion of this office which request reads in part as follows:

"The State Board of Barber Examiners would like to have a written opinion from your office in regard to Section 328.120, RSMo 1959. This Section provides that:

'2. There shall be not less than one teacher or instructor for every ten students in any barber school or college holding a permit under this section.'

"Does this mean that the instructor must be on the floor with the ten students during all school hours? The barber college in Kansas City has sixty students, so they have the required six instructors on their payroll. However, one instructor is in the office, and another one teaches at the barber college part time and at the beauty school part time. We have been receiving complaints because these instructors are not on the floor with the students at all times. I have talked with the

Mr. Leon F. Burton

instructors, and they think that they are operating according to law by having the required number of instructors employed even though they are not all with the students."

In a subsequent letter, you advised that the phrase "on the floor" as used in your request means "the time which the student spends in the actual cutting of hair at the barber chair." By way of further explanation, you stated:

"All students receive one hour of lectures and demonstrations each day, excepting Saturday, and the remainder of their time is spent on the floor."

We note that both Sections 328.080(3) and 328.120(4), RSMo 1959, manifest the legislative intent that a barber college or school give a course of at least six months' duration consisting of one thousand hours of study under the "direct supervision of a licensed instructor . . ."

Inasmuch as a large part of the training involves practical experience during which students are actually applying instruments such as scissors and razors to human scalps, faces and necks, we do not believe that a literal interpretation of the law would produce an unreasonable result in this instance.

To hold otherwise would be to permit situations wholly inconsistent with the clear legislative intent. Under any other holding, the mere employment by the school of licensed instructors, only one of whom actually supervised the work of the students, would in itself satisfy the statutory requirements; and such persons could be carried on the books as faculty members without ever setting foot in the school.

Obviously, if the school mentioned in your request employs only six instructors for sixty students, the clear requirement of the law is not being fulfilled when, during the "on the floor" training, one of the instructors is working in the school office and another is teaching in an entirely different school.

Mr. Leon F. Burton

Conclusion

Therefore, it is the opinion of this office that while the students in a barber school or college are engaged in the practical portion of their training, Chapter 328, RSMo 1959, requires that there be one licensed instructor present and directly supervising the training of not more than ten students.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours

---

THOMAS F. EAGLETON  
Attorney General

AJS:im



May 29, 1963

OPINION NO. 122  
ANSWERED BY LETTER

Mr. Orville C. Winchell  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri



Dear Mr. Winchell:

This is in answer to your letter requesting an official opinion of this office.

Under the provisions of Section 473.463 RSMo 1959 the administrator of an estate, where there are no heirs or legal representatives of heirs, has authority and it is his duty to sell all personal and real property of the decedent within nine months after Letters of Administration are granted.

There is no reason to doubt the validity of this statute nor the authority and duty it places on the administrator of such an estate.

The legislature obviously intended by its reference to real property in this section to give the administrator the power and duty he had formerly possessed with regard to personal property, Section 463.040 RSMo 1949.

We therefore see no reason why the public administrator of an estate, where there are no heirs or representatives of heirs and when the administrator has been properly appointed, should not proceed to sell the personal and real property of such decedent unless the court otherwise orders.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

EGB:ca

INSURANCE: Proceedings of board of directors of Shield Life and Accident Insurance Company, changing from stipulated premium life insurance company to regular life insurance company are in acceptable legal form.

Opinion No. 124

March 8, 1963



Honorable Jack L. Clay  
Superintendent of the Division  
of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of February 28, 1963 transmitting a record of proceedings of the board of directors of Shield Life and Accident Insurance Company by which this stipulated premium life and accident insurance company proceeded under Section 377.450 RSMo 1959 to accept the provisions of Sections 376.010 to 376.670 RSMo 1959 of Missouri's regular life and accident insurance law.

Pursuant to the directive contained in Section 377.450 RSMo 1959 a review of the record of proceedings taken on January 16, 1963, and certified on January 21, 1963, has been made. Such record discloses that Article III of the Articles of Incorporation of said company has been amended to disclose an increase in the authorized capital stock from One Hundred Thousand Dollars (\$100,000.00) consisting of One Hundred Thousand (100,000) shares of the par value of One Dollar (\$1.00) each, to One Hundred Fifty Thousand (150,000) shares of a par value of One Dollar (\$1.00) each, with One Hundred Thousand (\$100,000.00) thereof having been bona fide subscribed and actually paid up in lawful money of the United States. The record of proceedings further discloses an amendment to Article VI of the company's Articles of Incorporation so that it will be authorized to make insurance on the lives of individuals and to provide for indemnity against death or disability of an insured occasioned by sickness, accident, old age or otherwise, as provided in Sections 376.010 to 376.670 RSMo 1959.

Examination of the record of proceedings referred to herein

Honorable Jack L. Clay

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discloses that the same are in acceptable legal form.

The foregoing opinion which is hereby approved, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JLO'M:lt

Opinion No. 126 Answered by letter  
(O'Malley)

March 21, 1963



Honorable Tom Baker  
Member, Missouri House of Representatives  
State Capitol  
Jefferson City, Missouri

Dear Mr. Baker:

This letter of advice is in answer to your inquiry directed to the following financial statement published by Pike Township, Stoddard County, for the fiscal year 1962:

"PIKE TOWNSHIP FINANCIAL STATEMENT

Current Fund

Total Receipts, 1962 -----	\$ 5,373.09
Balance on Hand, Jan. 1, 1962 -----	4,230.11
Total Receipts & Balance, Jan. 1, 1962 -----	\$ 9,603.20
Total Expenditures -----	6,881.42
Balance Dec. 31, 1962 -----	\$2,721.75

Road & Bridge Fund

Total Receipts for 1962 -----	29,542.73
Balance on Hand Jan. 1, 1962 -----	8,178.01
Total Receipts and Balance for 1962 -----	37,720.74
Total Expenditures -----	29,684.60
Balance on Hand Dec. 31, 1962 -----	\$ 8,036.14

A. K. Abernathy, Clerk"

You have asked this office to test the legal sufficiency of the financial statement quoted above, and to disclose how publication of a proper financial statement may be compelled.

Records disclose that Stoddard County is under township organization as authorized by Chapter 65 RSMo 1959. While we do not find in the framework of Chapter 65 RSMo 1959 any directive to publish any financial statement, Section 231.280 RSMo 1959, under which the above quoted financial statement is obviously published, is here quoted in full:

"The township board of directors in all counties under township organization shall keep, or cause to be kept, a full, true and correct record of all moneys received and disbursed on account of roads and bridges and all other receipts and disbursements of every nature in such township, showing in detail from whom and on what account such money was received, and to whom and for what purpose disbursed, together with a complete inventory of all tools, road machinery and other property belonging to the township, together with such other information as to the condition of roads and bridges and the needs of same as may be deemed of value, and within thirty days after the end of the fiscal year of said township board of directors, which fiscal year shall begin and end on the same date as the fiscal year of the county in which such township is located, shall cause to be published an itemized statement of such receipts and expenditures, inventory of tools, machinery and other property in some newspaper published in such township, and if there be no newspaper published in the township, then such publication may be made in any newspaper of general circulation within such township published in the county. Such statement shall be made by the township clerk under the direction of the township board, and shall be sworn to by such clerk, and it shall be the duty of the township clerk within thirty days after the end of the fiscal year of said township board to file one copy each of such detailed statement with the chief engineer of the Missouri state highway commission at Jefferson City, and with the county clerk of such county, and county clerk shall lay the same before the county court at its regular meeting. "



Section 231.290, RSMo 1959 provides:

"For the purpose of carrying out the provisions of section 231.280, it shall be the duty of the county clerk in counties having township organization to prepare, at the expense of the county, forms for the publication of the detailed statement of the township's receipts and disbursements, on or before the twentieth day of February of each year, and submit the same to the township clerk of each township, together with any other information he may deem necessary and the county clerk shall require each township board to make such publication according to the form submitted, and also require a certified copy of such statement to be filed in his office on or before the twentieth day of March of each year."

Section 231.290 RSMo 1959, quoted supra, has remained unchanged since being placed in Laws of Missouri, 1917, page 561, Section 22. Section 231.280 RSMo 1959, quoted supra, has had only one change in its language since it was placed in Laws of Missouri, 1917, page 561, Section 21, such minor changes occurring in the repeal and reenactment of the section in 1945 (Laws of Missouri, 1945, page 1498). The two minor changes made in 1945 to what is now Section 231.280 RSMo 1959 provided for timing the required report to the fiscal year of the township, and for furnishing a copy of such report to the Missouri State Highway Commission.

Section 231.280 RSMo 1959 uses the following language when disclosing how detailed the required financial statement must be:

"The township board of directors in all counties under township organization shall keep, or cause to be kept, a full, true and correct record of all moneys received and disbursed on account of roads and bridges and all other receipts and disbursements of every nature in such township, showing in

detail from whom and on what account such money was received, and to whom and for what purpose disbursed, together with a complete inventory of all tools, road machinery and other property belonging to the township, together with such other information as to the condition of roads and bridges and the needs of same as may be deemed of value, and \* \* \* shall cause to be published an itemized statement of such receipts and expenditures; inventory of tools, machinery and other property in some newspaper published in such township, and if there be no newspaper published in the township, then such publication may be made in any newspaper of general circulation within such township published in the county. \* \* \* (Underscoring supplied)

The Pike Township financial statement for 1962 incorporated in the forepart of this opinion does not on its face disclose a colorable attempt at compliance with Section 231.280 RSMo 1959, and must be construed to be legally insufficient.

Under the provisions of Section 231.290 RSMo 1959, quoted supra, it is the duty of the county clerk in a county under township organization to prepare forms for the publication of the detailed statement required by Section 231.280 RSMo 1959. Section 231.330 RSMo 1959 prescribes penalties for willful failure to comply with Sections 231.150 to 231.330 RSMo 1959, and reads as follows:

"Any official or other person who shall willfully fail to comply with any of the provisions of sections 231.150 to 231.330, and any person who shall willfully violate any of the provisions thereof, shall be deemed guilty of a misdemeanor, and where no other or different punishment is provided, shall be punished by a fine of not less than five dollars nor more than five hundred dollars."

Any willful failure to comply with the directives found in Sections 231.280 and 231.290 RSMo 1959 will justify initiation of criminal proceedings against those officials responsible for not complying with such statutes, and such evidence should be made available to the Prosecuting Attorney of Stoddard County.

Honorable Tom Baker

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An additional copy of this letter is being attached in order that you may make the same available to your constituent who wrote to you in regard to this matter. The enclosures of your letter of March 5, 1963, are enclosed.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

Encl.  
JLO'M:lt

OPINION REQUEST NO. 127-63

answered by letter (Bushman)

March 13, 1963

Honorable George H. Pace  
Representative, Marion County,  
House Post Office  
Jefferson City, Missouri



Dear Representative Pace:

This is in answer to your letter dated March 6, 1963 wherein you request an official opinion from this office. In your letter you ask the question as to whether the Department of Revenue has any authority to reject motor fuel tax refund claims submitted by non-highway users.

As a general statement of law there is a public policy against refunds for taxes. IBM vs. State Tax Commission, Mo. Sup., 362 SW 2d 635. In the IBM opinion the Supreme Court of Missouri stated what they believe to be a "rather firmly fixed rule" by citing 51 Am. Jur., Taxation, Sec. 1167, p. 1005, "On grounds of public policy, the law discourages suits for the purpose of recovering back taxes alleged to be illegally levied and collected."

Since refunds are not favored, it is the opinion of this office that any taxpayer seeking a refund of motor fuel tax carries the burden of proving that he is entitled to such a claim. This position is substantiated by the language found in Section 142.230, RSMo 1959, where it states that "All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state."

This same statute goes on to provide the exact manner and procedure to be followed by those non-highway users seeking refunds. The refund claim must be in the form of an affidavit, stating the purpose for which the fuel was used. The affidavit must be supported by the original sales slip or invoice covering the purchase of the fuel. The forms upon which the claims are to be made are prescribed by the Collector of Revenue.

Honorable George H. Pace

Sub-section 5 of this statute states that no claim for refund of motor fuel is to be allowed unless " \* \* \* the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller \* \* \* " that the fuel was not intended to be used for propelling motor vehicles on public highways. The sales slip must also indicate that at the time of purchase the seller was notified of the purchaser's intention to later claim a refund for the tax paid.

This office places particular emphasis upon Sub-section 6 of this statute wherein it provides that upon receipt of the affidavit and invoice or sales slip "the Collector of Revenue, upon approving the same, shall cause the amount of the tax that such claimant paid to be refunded \* \* \*".

Since Section 142.230, supra, spells out in considerable detail the steps to be followed by the claimant and since there is direct statutory authority authorizing the Collector of Revenue to prescribe the affidavit forms and to approve them as well as the invoice and sales slips, it is our opinion that the Collector of Revenue thus has the discretionary authority of rejecting refund claims when they patently show an error. In exercising his discretion the Collector of Revenue is merely guarding against abuses of the refund privilege. To deny the Collector any discretionary authority and to make his duties in this regard merely ministerial would create a situation inconsistent with the claimant's burden of proving his refund. Of course, the Collector cannot under any circumstances exercise his discretion in an arbitrary and unreasonable manner.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

EGG:MW



June 5, 1963



Honorable Frank Conley  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Dear Mr. Conley:

This is in reference to your request of this office as to whether it is mandatory upon a probate judge to permit inspection of court records concerning the mentally ill. You enclosed a copy of a letter you received from Judge Lang, Probate Judge, Boone County, Missouri, in which he states that in recent years the court has been required by law to keep its records of mentally ill cases in a book separate from other records and for a period of two years inspection was restricted.

Under Article V, Section 17 of the Constitution of Missouri, 1945, the probate court is a court of record. Implementing this is Section 476.010, RSMo 1959, which states that probate courts shall be courts of record and shall keep just and faithful records of their proceedings. Section 476.040, RSMo 1959, provides that full entries of the orders and proceedings of all courts of record of each day be read in open court on the morning of the succeeding day. Section 476.170, RSMo 1959, requires the sitting of every court shall be public and every person may freely attend the same.

It is our view that under these statutory provisions, proceedings of the probate court have to be open to the public and their records are public records.

The question now arises whether there is any statute that exempts proceedings concerning the mentally ill from these general statutory provisions.

In House Bill 355, enacted by the Legislature in 1953, Laws of Missouri 1953, page 647, Section 9, provision was made for the exclusion of all persons from the hearings concerning the mentally ill in the probate court except those whom the court determined had a legitimate interest in the proceedings. Section 23 of the said act required all applications, records and reports concerning the proceedings to be kept confidential unless the court determined it would be contrary to public interest. Apparently these must be the statutory provisions which Judge Lang referred to in his letter.

Sections 9 and 23 of House Bill 355 are cited as Section 202.807 and 202.853 in Mo. Cum. Supp. 1955. These sections were repealed by the Legislature in 1957, Laws of Missouri 1957, page 672, and Section 202.807 was re-enacted with the secrecy provision omitted. At the present time, there is no statutory provision requiring a hearing in the probate court concerning a mentally ill patient to be conducted in secrecy or that the records concerning the same be kept confidential. The fact that the Legislature repealed the provisions of the statute providing for secrecy of the hearing and for the records to be kept confidential, indicates that the Legislature disapproved of such procedure.

We are enclosing herewith a rather exhaustive opinion issued by this office on February 5, 1963, to Honorable Loicen O. Boyd, Prosecuting Attorney, Worth County, Grant City, Missouri, construing Section 109.180 and 109.190, Mo. Cum. Supp. 1961, concerning inspection of public records.

It is our view that probate court records of all proceedings concerning the mentally ill are open to public inspection.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

MM:lt  
Enclosure

COUNTIES:  
COLLECTORS:  
COMPENSATION:  
STATUTES:

At no time during the term of office of the county collectors within the classification of Subdivision (14), Section 52.260, which collectors took office in March, 1959, for a four year term, were such collectors obliged to deduct from their commissions expenditures for office space, office equipment or supplies.

OPINION NO. 137

July 29, 1963

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in response to your recent request for an opinion of this office which request reads as follows:

"A problem has arisen in connection with the auditing of records of certain county collectors in third class counties, and I present the problem herewith for your consideration and opinion:

"The collectors with whom we are concerned are those in the classification of subdivision (14), Section 52.260, who took office on the first Monday in March, 1959 or for any term or terms prior to the one beginning in 1959. At the time such collectors took office, their compensation was set by subdivision (14), Section 52.260, RSMo. 1949, which provided in part:

"The said collector shall pay all salaries and other expenses of his office and all other costs of collecting the respective revenues; \* \* \*

"In 1959, the 70th General Assembly amended Section 52.260 so as to delete the requirement set out above. The new form of Section 52.260 took effect after the commencement of the terms of the collectors with whom we are concerned. The requirement that such collectors pay deputy and clerical hire was retained in Section 52.280 which has been in effect throughout.

"At all times relevant to this inquiry, Section 49.510 has been in effect in its present form which provides:

"'It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct.'

"The question which arises from this situation is whether these collectors were, at any time within the period in question, liable for the payment of costs of the supplies and furnishings enumerated in Section 49.510 by reason of the above quoted provision of Section 52.260, RSMo. 1949, which required such a collector to pay 'all salaries and other expenses of his office and all other costs of collecting the respective revenues; \* \* \*'

"If it is your opinion that prior to the effective date of the present Section 52.260, RSMo. 1959, such collectors were obligated to pay for the furnishings and supplies enumerated in Section 49.510 and that they were relieved of this obligation by the amendment of this section which occurred after they took office in 1959, then I would request your further opinion as to whether the release of these collectors from such obligation would amount to an increase in compensation 'during the term of office' as prohibited by Section 13, Article VII, Constitution of Missouri, 1945."

At the outset, we should reiterate the principle that where an officer's compensation is fixed by statutory formula and that formula is later changed so as to increase his compensation, the formula in effect at the commencement of his term continues to determine his compensation throughout his term of office. This was discussed in opinions of this office issued to Mrs. G. B. Stewart on January 26, 1961, and to Honorable Milton Carpenter on December 30, 1959, copies of which opinions are attached herewith.

Therefore, we are initially concerned with the method of determining compensation of county collectors in effect on the day the collectors involved here took office. On that date, the relevant portions of Section 52.260 provided that the collector would receive certain commissions of the various types of revenue collected, required the collector to "pay all salaries and other expenses of his office and all other costs of collecting the respective revenues; . . .," and limited such collectors to a maximum compensation of ten thousand dollars per year.

As pointed out in your letter, the requirement that such a collector "pay . . . other expenses of his office and all other costs of collecting the respective revenues" was removed by the 70th General Assembly. Senate Bill 62, Laws 1959. Parenthetically, we might also note that the 1959 revision omitted the ten thousand dollar limitation on annual salary. The date on which the form of Section 52.260, thus revised, became law was August 29, 1959. Laws 1959, page 14a. The ten thousand dollar salary limitation as well as a requirement that "expenses of his office and other costs of collecting the revenue" would be chargeable against his commissions, was re-enacted by the 71st General Assembly and took effect on October 13, 1961. Senate Bill 214, Laws 1961, pp. 287, 687.

Prior to the 1959 revision of Section 52.260, and subsequent to the 1961 amendment of Section 52.270, there was an apparent conflict between those sections and the provisions of Section 49.510 relating to office supplies and rental of office space. The form of Section 52.260 in effect when these collectors took office required the collectors to pay "all" expenses of their offices. Standing alone, this provision would seem to cover everything mentioned in Section 49.510, for "stationery, supplies, equipment, appliances and furniture" are certainly necessary "expenses" of any office and a prerequisite to the functioning of a county collector's office.



However, it is a well accepted principle of statutory construction that where two statutes purport to regulate the same subject matter, they will be read in harmony when possible. As our Supreme Court said in State v. Ludwig (1959), 322 S.W.2d 841, 849:

"\* \* \*the test of repeal of statutes by implication is repugnancy: 'Repeals by implication are not favored--in order for a latter statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand.' State ex rel. and to Use of Geo. B. Peck Co. v. Brown, 340 Mo. 1189, 1193, 105 S.W.2d 909, 911. One of these statutes dealing with the rate of commissions and the other limiting the amount of commissions an ex-officio collector may retain are obviously not repugnant or so in conflict that both may not operate. As previously indicated, the statutes concern the same general subject, they are related, they modify one another but may and, if possible, should be construed together (State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S.W. 129), one prescribing the rate and the other limiting the commissions to be retained by an ex-officio collector. The statutes, therefore, are not in irreconcilable conflict so that the re-enactment of section 54.320 in 1951 may be said to have impliedly repealed section 52.270. \* \* \*"

We do not believe that the apparent conflict between Sections 49.510 and 52.260 is such as to render impossible their having simultaneous effect upon the collectors with whom we are concerned. A strong argument may, of course, be made that the use of the universal "all" in Section 52.260 prohibits the application of any statute which places

the obligation to pay for services or supplies used by collectors anywhere but on the officers themselves. However, a cardinal rule of statutory interpretation is that a statute will be interpreted so as to have reasonable effects; and, in arriving at the proper interpretation the alternative effects will be considered. *E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.* (1909), 216 Mo. 658, 116 S.W. 530, 534; *Memmel v. Thomas* (Mo. App. 1944), 181 S.W.2d 168, 169-170.

The only alternative to the interpretation adopted herein would be that Section 49.510 does not apply at all to the collectors mentioned in your request. Hence, such collectors would not be entitled to be furnished office space. As a result of this, they would be obliged to provide their own or pay rental for space in the county courthouse for they would have no better claim to such space free of charge than would any other citizen who desired to set up a business at such a location. Under the interpretation which we reject, a collector would be obliged to pay for all office furnishings and equipment needed for the operation of his office in addition to day-to-day needs such as stationery. The acquisition of quasi-permanent appliances such as tabulating and computing machines, electric typewriters, etc., aside from involving a great deal of expense, would come at such irregular intervals and would vary so greatly from county to county, that exclusion of these collectors from the application of Section 49.510 would work an unjust and disproportionate burden upon them.

As a matter of incidental interest, this office has held on two prior occasions that county collectors of this class are entitled to the benefits accorded all county officers by Section 49.510. On December 30, 1959, this office issued an opinion to the Honorable Milton Carpenter which held in part:

"\* \* \* The payment of salaries of deputy and clerical hire in such counties would not be the obligation of the county but would be the obligation of the collector, but the other expenses of the office and other costs of collecting the revenues would be the obligation of the county under Section 49.150, RSMo 1949; \* \* \*."

A similar conclusion was reached in an opinion issued by this office on January 19, 1962. A copy of each of those

opinions is attached herewith.

By way of summary, we should point out that, in our opinion, when these collectors took office in March, 1959, they were not obliged to deduct from their commissions expenditures for any of the items enumerated in Section 49.510 and that this condition has persisted throughout, the counties being at all times obliged to provide those items. The ten thousand dollar limitation as to these collectors has been in effect at all times applicable to this opinion: from March to August 29, 1959, by statute; from August 30, 1959, until October 13, 1961, by constitutional prohibition against salary increase during a term of office; from October 14, 1961, to the present by the current form of Section 52.270, Cum. Supp. 1961.

#### Conclusion

Therefore, it is the opinion of this office that at no time during the term of office of the county collectors within the classification of Subdivision (14), Section 52.260, which collectors took office in March, 1959, for a four year term, were such collectors obliged to deduct from their commissions expenditures for office space, office equipment or supplies.

This opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours

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THOMAS F. EAGLETON  
Attorney General

AJS:1m

March 22, 1963



Honorable Vance R. Frick  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Mr. Frick:

This letter of advice is issued in lieu of a formal opinion in answer to your inquiry of March 16, 1963, in relation to the semiannual financial statement required to be published by the City of Brashear, a Fourth Class city, under the directives found in Sections 79.160 to 79.170 RSMo 1959.

Members of the present city council of the City of Brashear are to be commended for their expressed determination to effect compliance with the statutes mentioned above.

In view of the requirement in Section 79.160 RSMo 1959 that the financial statement is to be published in January and July of each year, it is recommended that publication at this date of the statement due in January, 1963, will constitute a bona fide attempt at compliance with the statute and it will not be necessary to publish such statement as of July, 1962, or prior thereto.

In order that you may know the views of this office touching the sufficiency of the statement to be published, we enclose a copy of a letter of advice directed by this office on March 19, 1962, to Honorable W. D. Hibler, Jr., Member, Missouri House of Representatives.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

Enc.

JLO'M:lt

OPINION REQUEST NO. 140  
answered by letter  
(Baumann)

FILED  
140

April 1, 1963

Honorable Paul Boone  
Prosecuting Attorney  
Ozark County  
Gainesville, Missouri

Dear Mr. Boone:

This refers to your letter of March 15, 1963, concerning the authority of a county court to grant an easement for a private or public road across "sixteenth section land."

The title to school land of the kind to which you refer and the powers of a county court with respect thereto are discussed in *Bonsor V. Madison County*, 204 Mo. 84, 102 SW 494, 497, and, while that is a rather old case, there does not appear to have been any subsequent change in the statutes which would affect your problem.

As stated in that case, title to such school land has not been conveyed to the counties and, instead, remains in the State of Missouri until it is patented by the state to purchasers thereof. As also there stated, the county courts, by statutory provisions now found in Chapter 166, RSMo 1959, are made trustees to sell the land under a procedure there set forth, with patents being issued by the state after such sales. However, it seems clear that these statutory provisions do not authorize county courts to grant easements such as are mentioned by you; and we do not know of any other provisions which grant such authority.

You undoubtedly carefully investigated this matter before writing to us and, if you believe that there are other statutory provisions which might have a bearing upon it, we will be glad for you to bring them to our attention. While it does not relate directly to your problem, we are enclosing a copy of an opinion furnished by this office to John Hosmer on May 15, 1959, concerning the sale of "sixteenth section land."

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JCB:MW  
enclosure



(Opinion #143 answered by letter)  
Stephan

March 14, 1963



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Mr. Burrell:

The Missouri Supreme Court in its Harvey opinion (copy enclosed) wrote as follows:

"In the light of the history and background of these sections, and taking judicial notice of the matters hereinabove mentioned, upon what we deem to be an objective reappraisal of our views as formerly expressed, we have concluded, and accordingly hold that the presence of the phrase 'or other articles of immediate necessity' renders the statutory scheme of Sunday closing (as embodied within the two sections here under scrutiny) so vague and indefinite that it cannot be ascertained with any reasonable degree of certainty what sales are permitted, and what sales are interdicted, thus making the statute incapable of rational enforcement, and hence void." (Emphasis ours.)

A 3.2 beer case is docketed for argument on April 23, 1963 (State of Missouri v. Gilbert Smith, #49531). In this case appellant contests the applicability of Secs. 563.720 and 563.730 to the sale of 3.2 beer on Sunday. It is expected that the appellant will file a motion to reverse the judgment of conviction based on the Harvey decision; and, if the court grants such a motion, then of course that will finally close the door on this matter insofar as Secs. 563.720 and 563.730 are concerned.

Yours very truly

Albert J. Stephan, Jr.  
Assistant Attorney General

enc.

May 3, 1963



Honorable James A. Dunn  
Assistant Prosecuting Attorney  
Jasper County  
204 South Garrison Avenue  
Carthage, Missouri

Dear Mr. Dunn:

This letter is in response to your request of March 19, 1963, for an opinion of this office. You inquire in re Supreme Court Rule 76.17:

"\* \* \*whether or not a Recorder of Deeds can properly refuse to file for record a Notice of Levy or Abstract of Attachment unless the filing fee for the same be paid in advance by the Sheriff, who is under the legal duty to place these documents on record."

A similar inquiry has been previously answered by this office. I enclose herewith an opinion dated February 2, 1959, issued to Honorable James H. Anderson, Assistant County Counselor, Jackson County, Kansas City, Missouri.

We have researched your inquiry and it is the conclusion of this office that the more specific and definite legislative expression of Section 513.085, RSMo 1959, Supreme Court Rule 76.17, prevails over the general provisions of Section 59.320, RSMo 1959. The county recorder must file and record

Honorable James A. Dunn

-2-

May 3, 1963

notices of levy under Section 513.085 and cannot demand payment of fees in advance of recording but must "charge and collect as other costs" the recording fees therefor.

I trust this will fully answer your question.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

LD:lt

Opinion No. 153 answered by letter  
(Nessenfeld)

May 3, 1963



Honorable Don Owens  
Senator, 20th District  
374 South Bernhardt  
Gerald, Missouri

Dear Senator Owens:

We have your request for our opinion on the following questions which were submitted to you by Honorable Clem A. Buerger, Presiding Judge of the St. Charles County Court:

"St. Charles County, Missouri has in process a re-evaluation program and is endeavoring to place all new valuations on the 1964 tax books and it is anticipated a large amount of properties (6,000 to 8,000 parcels) in this County will be subject to increase in valuation. Therefore, this Court would like an opinion on the questions as set out:

"1. Can we notify by Certified Mail those taxpayers of the increased 1964 assessment on their properties beginning in late August, 1963 and have a hearing by a Board of Equalization for those aggrieved, during this same time (Aug. 1963 to Dec. 1963) to enable all increased property owners an opportunity to be heard and help collate this mass of paper work to become a part of the 1964 tax book record.

(a) Hearing would begin after the Board of Equalization and Appeals for the current 1963 year is concluded.

"2. Assuming that the above is placed into process and that each increased property owner is notified by Certified Mail and the aggrieved taxpayer does not recognize this notice of his scheduled hearing, will it be necessary to again notify this taxpayer in July 1964 at the regular Board of Equalization before the tax books are concluded for that current year."

As we understand the questions, they relate solely to proposed 1964 assessments, and that no increases are intended to be made with respect to 1963 valuations as the result of the re-evaluation program.

By way of preliminary observation, we note that the duty of determining the value of property for the purposes of taxation is initially that of the assessor. Sections 137.115 and 137.180, RSMo. We assume that the re-evaluation program to which you refer is one which is being made by experts pursuant to contract with the county court for the purpose of furnishing information to the county assessor in securing a full and accurate assessment of all property in the county liable to taxation. Under date of October 4, 1961, this office issued an opinion to Honorable Donald E. Dalton, Prosecuting Attorney of St. Charles County, holding that such procedure was valid in St. Charles County because it has a population in excess of 40,000 inhabitants. The information resulting from the expert re-evaluation is not binding either on the assessor or the Board of Equalization but may be used by them in performing their duties.

Under the law, each year's assessment of property constitutes an independent proceeding, and each year's tax is a separate transaction. To this effect is *Cupples-Hesse Corp. v. Bannister*, 322 SW2d 817. The statutory scheme of assessment in Chapter 137 provides that the assessor shall first fix a value for the property as of January 1 of the tax year. Sections 137.080, 137.115, and 137.180, RSMo. This valuation is reviewable by the county board of equalization. Sections 137.275, 138.050, and 138.060, RSMo. However, the board is authorized to act only with respect to



assessments and valuations for the current year. It has no authority to make any determination respecting the value to be assigned to any property as of January 1 of the following year. This is particularly true in view of the fact that the assessor must first determine the value of the property, and he cannot do so with respect to 1964 prior to the commencement of such year.

We see no reason why an unofficial notice of the result of the re-evaluation may not be given to the property owners in order to guide them in making out their assessment lists for 1964 taxes. If the assessor, on the basis of the expert re-evaluation or otherwise, determines that the valuation as returned by the owner in 1964 should be increased, then he is required to give a notice of such increase under the provisions of Section 137.180. This is equally true as to all subsequent years. Each annual assessment stands on its own footing, and any increase in valuation, as that term is used in Section 137.180, refers to the value placed upon the property by the owner in his list which he is required to return to the assessor. It follows that if a property owner in 1964 lists his property for taxation at a valuation less than that which the assessor, making use of the information acquired from the re-evaluation program, determines is proper, then a notice to the property owner is required without regard to what was done the preceding year. So, too, if the county board of equalization which meets in 1964 determines to increase the valuation, a similar notice is required.

Very truly yours,

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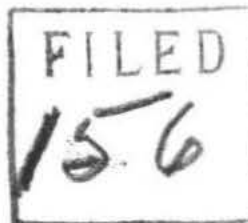
THOMAS F. EAGLETON  
Attorney General

JN:sr

cc - Hon. Clem A. Buerges  
Presiding Judge  
St. Charles County Court  
St. Charles, Missouri

Opinion No. 156 answered  
by letter (O'Malley)

April 9, 1963



Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County Courthouse  
Clayton, Missouri

Dear Mr. O'Brien:

This letter of advice is submitted in lieu of a formal opinion in reply to your inquiry reading as follows:

"We have been requested to obtain an Attorney General's opinion in regard to the following question. Section 63.130 Missouri Revised Statutes provides that 'the County Courts shall provide and maintain proper offices for said constables adjacent to or in connection with the Magistrate Court - - -'.

"The question is whether or not this statute requires a constable to actually be physically adjacent or in connection with the Magistrate Court which he serves."

Section 63.130, RSMo 1959, provides:

"The county court shall provide and maintain proper offices for said constables adjacent to or in connection with the magistrate court and furnish public utilities, stationery and office supplies necessary to the efficient performance of the duties of his office."

April 9, 1963

The plain wording of the foregoing statute discloses a legislative mandate directed to the county court in the disjunctive. The offices are to be maintained either (1) adjacent to, or (2) in connection with, the magistrate court. One form of compliance is all that is required.

In *Nomath Hotel Co. v. K. C. Gas Co.*, 223 S.W. 975, 204 Mo.App. 214, 1. c. 234, the word "adjacent" is discussed in the following language:

"'Adjacent' is defined as being near or close at hand; adjoining; bordering. [New Standard Dictionary.] It does not at all times mean abutting but it is usually synonymous with abutting, adjoining and bordering. [In re Bridge Bonds, 128 Pac. 681.] It means contiguous, adjoining, lying close at hand, near. Its precise and exact meaning, however, is 'determinable principally by the context in which it is used and the facts of each particular case or by the subject-matter to which it is applied.' [1 Corp.Juris., 1196.] The term is a relative one and hence is necessarily governed by the nature and circumstances of that to which it is applied." (Underscoring supplied.)

When searching for a meaning to be given to the language "in connection with," as the same is used in Section 63.130, RSMo 1959, quoted supra, we recommend the language used by the Supreme Court of Missouri in the case of *Helpers of the Holy Souls v. Law*, 267 Mo. 667, 186 S.W. 718. When alluding to the corporation's power to maintain an organized society of the same name and in cooperation with it, the Supreme Court spoke as follows at 267 Mo. 667, 1. c. 675:

"Taking the foregoing alphabetical subdivisions in order, by the first the plaintiff corporation was empowered to maintain an organized society of the same name and in cooperation with it (for that is the meaning of the terms 'in connection with same') \* \* \*."

Honorable Daniel V. O'Brien      - 3 -      April 9, 1963

Since the word "adjacent" has been demonstrated to be a relative term, and this office is without knowledge as to any feasible plans which the governing body of St. Louis County is in a position to carry out in relation to establishing offices for constables, it would not be proper for this office to direct how the mandate of the statute is to be carried out.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JLO'M: sr

RELIGION:  
SCHOOLS:  
CONSTITUTIONAL LAW:  
TEACHING OF RELIGION:  
STATE COLLEGES:

It is permissible for regular faculty members to teach academic courses about religion as a part of the curriculum of a state supported college.

Opinion No. 157

June 25, 1963



Dr. L. E. Traywick  
President  
Southwest Missouri State College  
Springfield, Missouri

Dear Dr. Traywick:

At your request and on behalf of the Board of Regents of Southwest Missouri State College, the attorneys for the Board of Regents have requested an opinion of this office with regard to a proposed plan of the Board of Regents to establish a Department of Religion at Southwest Missouri State College. They have also requested our opinion regarding authority of the college to offer academic courses such as literature of the Bible, comparative religions, religious ethics, etc., as a part of the curriculum of the college to be taught by regular faculty members.

A page and one-half outline of the proposed plan for the Department of Religion was enclosed with the opinion request and reference was made to an opinion of this office dated August 4, 1950, and addressed to President Roy Ellis, Southwest Missouri State College, Springfield, Missouri.

We first quote the conclusion of said opinion of August 4, 1950, which was as follows:

"In view of the decision of the Supreme Court of the United States in *McCullum v. Board of Education*, it is the opinion of this department that the teaching of Bible and religious education courses at the Southwest State College at Springfield, as currently approved by the Board of Regents and contained in the college catalogue, is unlawful because it violates



the 'establishment of religion' clause of the First Amendment to the Constitution of the United States."

We emphasize that this opinion was based exclusively upon the provisions of the Constitution of the United States and upon the decisions of the Supreme Court of the United States cited therein.

We now call your attention to the very recent decisions of the Supreme Court of the United States dealing with this subject and rendered subsequent to the previously mentioned 1950 opinion of this office: *Engel v. Vitale*, 370 U.S. 421; *School District of Abington v. Schempp* and *Murray v. Board of School Commissioners of Baltimore*, decided by the Supreme Court of the United States on June 17, 1963, and not yet officially reported.

In answer to your question concerning the teaching of academic courses by regular faculty members as a part of the curriculum of the college, we refer you to the recent case of *School District of Abington v. Schempp* and quote portions of that decision as follows.

Mr. Justice Clark in delivering the opinion of the Court said:

"\* \* \*In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistent with the First Amendment. \* \* \*"

Mr. Justice Brennan, in his concurring opinion, said:

"\* \* \*The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differ-

ences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum religious materials should be cited, are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be 'to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.' \* \* \*"

Mr. Justice Goldberg, with whom Mr. Justice Harlan joined, in his concurring opinion said:

"\* \* \* And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety \* \* \* of the teaching about religion, as distinguished from the teaching of religion, in the public schools.  
\* \* \*"

We feel that these quotations from the Schempp case are dispositive of your question concerning the teaching of academic courses by regular faculty members as a part of the curriculum of the college.

With regard to the question concerning the establishment of a Department of Religion, we call your attention to the fact that in the Schempp case there were two trials in that the Supreme Court remanded the original case for further proceedings, but in spite of this Mr. Justice Stewart began his dissenting opinion as follows:

"I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated. \* \* \*"

Mr. Justice Stewart would remand both cases for further hearings.

We call this to your attention to emphasize that any decision on this question must necessarily depend upon a determination and adjudication of the actual facts of the case. This determination must be a judicial determination as Mr. Justice Goldberg said at the beginning of his concurring opinion:

"As is apparent from the opinions filed today, delineation of the constitutionally permissible relationship between religion and government is a most difficult and sensitive task, calling for the careful exercise of both judicial and public judgment and restraint. \* \* \*"

Mr. Justice Goldberg further stated:

"The singular sensitivity and concern which surround both the legal and practical judgments involved impel me, however, to add a few words in further explication, while at the same time avoiding repetition of the carefully and ably framed examination of history and authority by my Brethren. \* \* \*

"\* \* \*To be sure, the judgment in each case is a delicate one, \* \* \*."

Mr. Justice Brennan in his concurring opinion said:

"\* \* \*The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion--a line which must be considered in the cases now before us. \* \* \*"

Mr. Justice Brennan further stated:

"The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. \* \* \* Moreover, it may serve to suggest that the scope of our holding today is to be measured by the special circumstances under which these cases have arisen, and by the particular dangers to church and state which religious exercises in the public schools present. \* \* \*."


#### CONCLUSION

These quotations show that there is a delicate, almost imperceptible line between the permissible and the impermissible practices, between the teaching of religion pedagogically and the teaching of religion for religion's sake, between the teaching of religion as a part of civil morality or history and the teaching of religion as a sectarian doctrine. Lines have been drawn by the Supreme Court of the United States in these decided cases on the basis of facts adduced in extensive hearings and extensive judicial proceedings.

It would be impossible of me to render an opinion upon the legality of a proposed plan without the benefit of judicially established facts and particularly when such a plan is still in a nebulous process of formation and is subject to drastic and instantaneous change in both form and substance.

Under the circumstances, I can do no more than call your attention to these recent opinions of the Supreme Court of the United States and suggest that the ultimate authority for the legality of any proposed plan would be a decision by a proper judicial tribunal based upon judicially ascertained facts.

Yours very truly,

  
THOMAS F. EAGLETON  
Attorney General

BANKS AND BANKING: The words "another community" found in Sections 362.325 and 363.520 RSMo 1959, relating to change in

location of an existing bank or trust company, do not refer to definite boundaries of political subdivisions, but refer to a community of people or interests, banking interests or banking facilities, and such fact issue is to be determined by employing procedures outlined in such statutes.

OPINION NO. 158

April 9, 1963



Honorable Robert B. Mackey  
Commissioner, Division of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Mackey:

This opinion is in answer to your inquiry of March 29, 1963, reading as follows:

"Section 362.325, RSMo., 1959, applicable to State chartered banks, and Section 363.520, RSMo., 1959, applicable to State chartered trust companies, treat of the amendment of Articles of Agreement in identical language as follows:

"...Provided, however, that if the change undertaken by any such (bank or trust company) in its articles of agreement shall provide for the relocation of such (bank or trust company) in another community, (then) the commissioner shall make or cause to be made an examination to ascertain whether the convenience and needs of such new community wherein such (bank or trust company) desires to locate are such as to justify and warrant the opening of such (bank or trust company) therein and whether the probable volume of business at such new location is sufficient to insure and maintain the solvency of such (bank or trust company) and the solvency of the then existing banks and trust companies at such location, without endangering the safety of any bank or



trust company in such locality as a place of deposit of public and private moneys, and, if the commissioner as a result of such examination be not satisfied in the particulars mentioned or either of them, he may refuse to issue the certificate applied for, in which event he shall forthwith give notice of such refusal to the (bank or trust company) applying for such certificate, which, if it so desires, may within ten days thereafter appeal from such refusal to the state banking board.'

"Section 362.020, RSMo., 1959, applicable to State chartered banks, and Section 363.030, RSMo., 1959, applicable to State chartered trust companies, both provide that original Articles of Agreement shall disclose 'the name of the city or town and county in this state in which the corporation is to be located'.

"This office desires to request your official opinion touching the meaning of the words 'another community' as found in Sections 362.325 and 363.520, RSMo., 1959."

A comparison of Sections 362.325 and 363.520, RSMo 1959, discloses that language you have quoted in your inquiry from such statutes is correct, except for the parenthetical wording which is used to demonstrate how such statutes may be read interchangeably when directing attention to such language.

We seek a meaning for the words "another community" as they are used in Sections 362.325 and 363.520, RSMo 1959, when a State chartered bank or trust company desires to change its location.

Pertinent to this inquiry is the following language from Michie On Banks And Banking, Permanent Edition, Volume 1, Chapter 2, Section 25:

"A statute authorizing an existing bank to change its articles of agreement in any way not inconsistent with the article relating to banks, was broad enough to include authorization of a change of

location, and prior to an amendment to that statute, the commissioner of finance had no discretionary authority to refuse to allow the change on the ground of the insufficiency of the probable volume of business at the new location". (Citing State v. Holt, 348 Mo. 982, 156 SW 2d 708).

The language you have quoted from Sections 362.325 and 363.520, RSMo 1959, came into the statutes by amendment in 1941 (Laws 1941, pp. 670, 674). No adjudicated cases in Missouri have been found disclosing what meaning should be given to the words "another community" when considering the right of a bank to relocate.

In the case of Upper Darby National Bank v. Myers, 124 A2d 116, 119, 386 Pa. 12, the Supreme Court of Pennsylvania was construing a statute which authorized a bank to establish a branch if the " \* \* city, borough or other community in which such branch is to be established is without adequate banking facilities \* \* \*". The Supreme Court of Pennsylvania spoke, in part as follows in its decision in 1956 (386 Pa. 12, 1.c. 18):

"Appellant contends that the words 'other community' refer to a political subdivision and can only mean 'township', especially when taken in conjunction with §203 which refers to relocations within or without a city, borough or township in which a bank's principal place of business or branch is located. We do not agree with this contention which is based on the principle of a ejusdem generis and which appellant frankly admits is a narrow technical interpretation. The Legislature knew how to use the word 'township' whenever it so desired, as in §203. Community in its ordinary or popular meaning does not mean township or other political subdivision; it means an area in which there is a community of people or interests, such as in this case banking interests or banking facilities. In rural counties people rarely ever know where a

borough or township line begins or ends, and in making deposits or doing a banking business they rarely ever think of whether they are crossing a township or political line, nor does a bank in a rural community think of political lines when it seeks to serve a community."

In *Household Finance Corporation v. Gaffney*, 90 A2d 85, 90, 20 N.J. Super. 394, the Superior Court (Appellate Division) of New Jersey was considering an appeal from the decision of the Commissioner of Banking and Insurance of New Jersey denying an application for an additional license to conduct a small loan business. Facts in this case disclosed that Household Finance Corporation had one office at 28 West State Street in Trenton, and that its application called for a second office at 45 East State Street, "about 1-1/2 blocks away". The Commissioner denied the application because of the statutory requirement touching convenience and needs of the "community". In alluding to the contentions of Household Finance Corporation touching the proper meaning to be given the word "community", the Superior Court spoke as follows at 20 N.J. Super. 394, l.c. 405:

"Its contention that the Trenton 'community' could not be confined to the municipal boundaries finds support in the record and is correct. So is its observation that what the precise geographical area should be is a question of fact."

In defining the word "community" as the word is used in Missouri's laws relating to organization of school districts, and with particular reference to the petition to establish which must be signed by resident citizens of any community, the Supreme Court of Missouri, in the case of *State ex inf. Carnahan ex rel. Webb v. Jones*, 181 S.W. 50, 51, 266 Mo. 191, l.c. 196, spoke as follows:

"The word community in this act is not employed in any technical or strictly legal sense, but is a sort of synonym of 'neighborhood' or 'vicinity' (*Berkson v. Railroad*, 144 Mo. l.c. 220, 221) or may be said to mean the people who reside in a locality in more or less proximity. [*Keech v. Joplin*, 157 Cal. l.c. 11]. So

defined, a community may include several districts and parts of districts. There is no requirement that petitioners shall reside here or there in the community. That they are resident citizens of it is enough."

In State ex rel. Bank of Nashua v. Holt, 348 Mo. 982, 1.c. 988, 156 SW2d 708, the Supreme Court of Missouri was alluding to the amendment made in 1927 to what is now Section 362.040, RSMo 1959, and spoke as follows:

"Prior to this 1927 change in Section 7942, banking business was on the basis of free competition, with regulation as to certain practices only. By this 1927 change in Section 7942 the Legislature commenced to apply the principle of partial regulated monopoly to banking (at least in creating new banks) somewhat in the nature of regulated monopoly as applied to public utilities by the Public Service Commission Act. The 1941 amendment to Section 7973 definitely applies this principle to all banks." (Underscoring supplied.)

The 1941 amendment to Section 7973 referred to in the above quotation is the same language quoted in your opinion request from Sections 362.325 and 363.520, RSMo 1959.

#### CONCLUSION

It is the opinion of this office that the words "another community", contained in Sections 362.325 and 363.520, RSMo 1959, relating to change in location of an existing bank or trust company, do not refer to definite and described boundaries of political subdivisions but refer to a community of people or interests, banking interests or banking facilities, and such fact issue is to be determined by employing procedures outlined in such statutes.

Honorable Robert B. Mackey    -6-

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

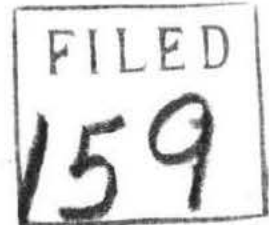
Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JLO'M:im:lt





April 11, 1963

Honorable Floyd L. Sperry, Jr.  
Prosecuting Attorney  
Henry County  
Clinton, Missouri

Dear Mr. Sperry:

This is in reply to your letter of March 29, 1963, in which you requested an opinion of this office in regard to fees of a recorder. In your letter you refer to Section 443.490 RSMo. The last sentence of paragraph one of Section 443.490 RSMo 1959 provides that "the fee shall also include and cover all costs for discharging the mortgage or deed of trust according to the methods herein provided." Paragraph two of that section provides for the discharge of a mortgage and deed of trust on the margin. It is therefore apparent that the fee of forty-cents includes and covers the costs for discharging the mortgage or deed of trust by marginal release.

For your further information we enclose a copy of an opinion of this office issued on August 28, 1935, to Honorable Elmer Hicklin, Recorder of Deeds, Kennett, Missouri; and an opinion of this office issued February 1, 1954, to Honorable Chas. B. Butler, Prosecuting Attorney, Ripley County, Doniphan, Missouri.

I trust that this letter will answer your question without the necessity of rendering a formal opinion upon your request.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

WWW:df  
encs.

OPINION REQUEST NO. 162 ANSWERED BY LETTER

May 10, 1963

Honorable Jack L. Clay, Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City,  
Missouri



Dear Mr. Clay:

This letter of advice is written in lieu of a formal opinion requested in your inquiry of April 1, 1963, regarding the Brotherhood of Railroad Trainmen.

The certificate submitted with your inquiry is described on its face as an "Occupational Accident Insurance with Benevolent Benefits," issued to a member of the Brotherhood of Railroad Trainmen, Insurance Department.

In answer to your first question as to whether the certificate is an insurance contract, we answer by saying that the certificate is replete with language on its face which calls for an affirmative answer to such question. Since the certificate refers to the benefits accorded as "accident insurance," describes the second party to the contract as the "insured," contains thirteen standard provisions, and other provisions, which are common to regular insurance policies providing similar benefits, no time will be spent in discussing specific provisions of the certificate.

As late as 1931, the Supreme Court of Missouri in the case of Clark v. Grand Lodge of the Brotherhood of Railroad Trainmen, 328 No. 1084, 1.c. 1096, 43 SW2d 404, spoke as follows in relation to the Brotherhood of Railroad Trainmen:

"But the defendant has also established and conducts an insurance branch of its business for the benefit of and limited

Honorable Jack L. Clay, Superintendent - 2

to the members of the order. That defendant is doing a large insurance business in this and other states is unquestioned. It collects and disburses large sums of money in connection with its insurance business. It is doubtless true that thousands of railroad trainmen carry no other insurance than certificates or policies issued by this association. The certificates of insurance issued are essentially insurance contracts. Thereby the defendant, in consideration of the payment of a premium in the form of monthly dues, undertakes and agrees to pay the person named as beneficiary a certain sum of money on death or disability of the insured."

Attention is now turned to your second inquiry seeking an answer to whether the certificate in question is exempt from the provisions of Chapter 378 RSMo 1959, Missouri's statutes having particular applicability to fraternal benefit societies. Section 378.120 RSMo 1959, provides in part, as follows:

"1. Nothing contained in this Chapter shall be so construed as to affect or apply to grand or subordinate lodges of societies, orders, or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges, or to

(1) Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business; and the ladies societies or ladies auxiliaries to such orders, societies or associations; \* \* \*."  
(Underscoring supplied)

Attention is directed to the underscored portion of Section 378.120 RSMo 1959, quoted above and we compare such language with that found and underscored from Clark v. Grand Lodge of the Brotherhood of Railroad Trainmen, 328

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Mo. 1084, l.c. 1097, 1098, as follows:

"Section 6021, Revised Statutes 1929, also a part of said Article 13, governing and imposing certain requirements on fraternal benefit societies, provides that 'nothing contained in this article shall be construed to affect or apply to . . . societies which limit their membership to any one hazardous occupation, \* \* \* The defendant association clearly comes within the exemption provisions of this statute." (Underscoring supplied)

If the present constitution or by-laws of the Brotherhood of Railroad Trainmen, neither of which has been made available to this office, alter the factual situation existing at the time of the ruling in Clark v. Grand Lodge of the Brotherhood of Railroad Trainmen, cited supra, such fact might cause the conclusion in this letter of advice to be altered.

In light of the court decision cited, as well as Section 378.120 RSMo 1959, you are advised that the Brotherhood of Railroad Trainmen is exempt from the regulatory provisions of Chapter 378 RSMo 1959.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

By \_\_\_\_\_  
Julian L. O'Malley  
Assistant Attorney General

JLO:df

COUNTY DEPOSITARIES:

Section 110.130, RSMo 1959, does not require county depositaries to be located within the county seat.

Opinion No. 163

July 19, 1963



Honorable Harold L. Volkmer  
Prosecuting Attorney  
Marion County  
Hannibal, Missouri

Dear Mr. Volkmer:

This opinion is given in response to your letter of April 1, 1963, requesting an official opinion of this office. You inquire:

"\* \* \*whether or not the County Depositary of County funds must be located in the County seat."

Historically the "county depositaries law", now Sections 110.130 - 110.260, RSMo 1959, has never provided that the county depositaries must be located within the county seat. Section 1 of the "county depositaries law" as originally enacted provided:

"It shall be the duty of the county court of each county in this state, at the February term thereof in the year 1891, and every two years thereafter, to receive sealed proposals from any banking corporation, association or individual banker in such county that may desire to be selected as the depositary of the funds of said county." (Emphasis Added) Missouri Laws, 1889, p. 81.

See also historical note, Section 110.130, VAMS 1949, at page 149.



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In 1959 the Legislature enacted several changes in the county depositaries law. Section 110.130, RSMo 1959, as amended, as far as relevant to this discussion now provides:

"Subject to the provisions of section 110.030 the county court of each county in this state, at the May term thereof, in each odd-numbered year, shall receive proposals from banking corporations, or associations at the county seat of the county which desire to be selected as the depositaries of the funds of the county.  
\* \* \* (Emphasis Added)

The particular question to be resolved herein is whether the phrase "at the county seat" inserted into Section 110.130, RSMo 1959, changes the law so as to limit the selection of county depositaries to those banks located within the county seat.

On the face of the present "county depositaries law" read as a whole, the phrase, "at the county seat" of Section 110.130 refers to where the proposals shall be received and not where the banking corporations or associations must be located. The "county depositaries law" encompasses Sections 110.130 to 110.260 inclusive. Reference to the location of banks eligible to be county depositaries is made in Sections 110.140, 110.180 and by reference in 110.190. In Sections 110.140 and 110.180 the location is described as "in the county". It is impossible to read into these sections the word "seat" after "county" without substantially changing the statute. The phrase "at the county seat" used in Section 110.130 can logically and grammatically be read as describing the location where the county court shall receive bids. In our opinion there is no ambiguity in these provisions and accordingly no right to construe them. Rules of construction are not to be used to create ambiguities, but indeed their use is dependent upon the existence of an ambiguity. Steggall v. Morris, Mo., 258 SW2d 577, 582; 50 Am. Jur., Statutes, §225.

Moreover, even if an ambiguity can be found to exist in the use of the phrase "at the county seat", application of the rules of construction fortify the conclusion supra, viz., that the phrase does not limit the banking corporations or associations eligible for selection as county depositary to those located within the county seat.

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The phrase, "at the county seat", was inserted into Section 110.130 by Senate Bill No. 77, of the 70th General Assembly. At page 7 of the re-perfected Senate Bill No. 77 the following comment by the legislative revisor is found:

"\* \* \*(The) words 'at the county seat of the county' limiting county depositaries to banks so located is inserted because §110.220 requires depositaries to maintain office at county seat and this another bank cannot do under §§362.105 and 363.170, RSMo."

Although the purpose of the revisor in inserting the phrase, "at the county seat", is clear, the revisor's purpose cannot be identified with the intention of the Legislature. No matter how clearly expressed a revisor's comments are not determinative of legislative intent, but are a mere indicia of legislative intent. The meaning of statutes cannot be determined by "testimony" of the draftsmen or even of the individual legislators. The intention of the Legislature controls the meaning of statutes, and when not expressly manifest on the face of the statute it must be determined by applying the established rules of statutory construction. It is permissible in construing an ambiguous statute to consider expressions of the individual legislators in debate or the comments of the draftsmen or revisor, yet such guides are not the most trustworthy and at best are entitled to limited reliance. State v. Board of Curators, Mo., 188 SW 128, 132; State v. Osburn, Mo., 147 SW2d 1065, 1068; State v. State Highway Commission, Mo., 42 SW2d 196, 202. At the risk of giving undue dignity to a relatively minor indication of legislative intent, we shall discuss at some length the above quoted comment.

The revisor's comment expresses the conclusion that under the then applicable law, due to the prohibitions against branch banking (Sections 362.105 and 363.170), a county depositary would necessarily have to be located at the county seat in order to meet the requirements of Section 110.220, RSMo 1949. (This statute required county depositaries to provide for payment at the county seat of all checks drawn on county funds.) The revisor reasoned: Section 110.220 requires all county depositaries to make payment of checks at the county seat; payment can only be made at the drawee bank or a branch thereof; but, branch

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banks are prohibited by Sections 362.105 and 363.170; therefore, only banks located within the county seat can be county depositaries. The revisor inserted the phrase, "at the county seat", and removed the phrase, "in such county". In other words, it appears that the intention of the revisor was to reword Section 110.130 to conform to the effect of Section 110.220 in the light of Sections 362.105 and 363.170, as he thought it to be.

The revisor's comment cannot be used to construe Section 110.130, RSMo 1959, because the premise of his reasoning is false in two respects. First, in concluding Section 110.220 in connection with Sections 362.105 and 363.170 limits county depositaries to those located within the county seat, the revisor overlooked the second proviso of Section 110.220 which empowered the county court to waive the requirement of payment of checks at the county seat. In other words banks other than those within the county seat could have complied with Section 110.220 without violating the prohibitions against branch banking. Second, the revisor's conclusion is further false because it is premised upon a no longer existent statute. Section 110.220, the premise of revisor's reasoning, was repealed by the very same act that amended Section 110.130, viz., Missouri Laws 1959, Senate Bill No. 77.

We are completely dissuaded from giving any weight to the revisor's comment here due to the limited reliance placed upon such extrinsic aids to construction and, even more dissuading, its false premises.

Even if we were to give weight to the revisor's comment as an indicia of legislative intent, it is outweighed by contrary indicia when further rules of statutory construction are applied. Were we to construe the phrase, "at the county seat", of Section 110.130, RSMo 1959, as requiring the county depositaries to be a banking corporation or association located within the county seat then a conflict between the several provisions of Chapter 110 would exist. The Section immediately subsequent to Section 110.130, Section 110.140, RSMo 1959 (setting out the procedures for bidders), provides, "Any banking corporation or association in the county desiring to bid shall deliver \* \* \* a sealed proposal", etc. See also Section 110.180, RSMo 1959. Sections 110.140 and 110.180 clearly express that any bank in the county can be a county depositary. Statutes are not to be construed as in conflict if any reasonable construction harmonizing the provisions can be made. Sections 110.130, 110.140 and 110.180 as

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amended were enacted together. Missouri Laws 1959, Senate Bill No. 77. We cannot presume the Legislature intended them to be in conflict.

"\* \* \* Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency. Thus, in the absence of any recognition of an inconsistency by repealing or amending, it is reasonable to assume that the legislative policy embodied in provisions enacted at the same time and relating to the same subject matter or in provisions the later of which refers to the prior and both of which concern the same subject matter is the same and that the provisions are consistent. \* \* \*" (Emphasis Added) Sutherland Statutory Construction, 3rd Ed., Vol. 2, §5205, p. 544.

That the phrase, "at the county seat", designates the place that proposals shall be received is a reasonable reading of the statute logically and legally and by such construction conflict is avoided and harmony resounds between the sections of Chapter 110. We must so read the statute.

Still another rule of construction fortifies our conclusion. Similar phrases used repeatedly in the same statute or similar statutes are presumed to have the same meaning. Conversely where the language used in one section is different from that used in other sections of the same chapter and from that used in a prior statute, it is presumed that such language is used with a different intent. Wine v. Commonwealth, Mass., 17 NE2d 545[6].

Several sections of Chapter 110, RSMo 1959, provide that the depository shall be within the same political subdivision as the institution or subdivision it will serve. See for example the phrase, "in the city, town or county in which the institutions are located", of Section 110.070 and the phrase, "in the city", of Section 110.080. Also see Section 110.040 and Section 110.180 where the phrase is "in the county." The former provisions of Section 110.130 used the phrase "in such county." This last mentioned provision was construed by the Supreme Court of Missouri as requiring the depository to be a resident



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of the same county. Wright County ex rel. Elk Creek Tp. v. Farmers' & Merchants' Bank, Mo., 30 SW2d 32, 34.

The phrase, "in the county", having been frequently used and indeed, judicially construed, clearly if the Legislature had intended to require the county depository to be located within the county seat it would have used the phrase, "in the county seat." We therefore must infer that the different phrase, "at the county seat", indicates a different intent, that the phrase was not intended to limit the selection of county depositories to those banks located within the county seat.

In construing a statute, consideration ought to be given to the purpose of the legislation, and the construction given the statute should accord with that purpose. State v. Mayfield, Mo., 281 SW2d 295, 297; State v. Bern, Mo. App., 322 SW2d 175, 177; 82 C.J.S., Statutes, §323. To construe Section 110.130, RSMo 1959, as limiting the selection of county depositories to those banks located within the county seat would be contrary to the purpose of the legislation.

In summary, the language of Section 110.130, RSMo 1959, read in context with the whole "county depository law," fortified by the concurring weight of applicable rules of statutory construction compels the conclusion that the phrase, "at the county seat", does not limit the selection of county depositories to those banking corporations or associations located within the county seat.

#### CONCLUSION

Therefore, it is the opinion of this office that a county depository of county funds is not required to be located within the county seat.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

LD:lt



COMPATIBILITY OF OFFICES:  
OFFICERS:  
CITIES OF FOURTH CLASS  
ALDERMAN:

In cities of the fourth class one individual cannot serve simultaneously as alderman and as collector.

April 19, 1963



Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri

ATTENTION: Jerald M. Alton

Dear Mr. O'Brien:

This opinion is given in response to your request of April 4, 1963 for an official opinion of this office. You inquire whether:

"In a city of the fourth class, can an individual be elected to both the office of alderman and the office of Collector and serve in both offices simultaneously?"

Generally one person may hold several public offices simultaneously unless prohibited by statute or constitution, or prohibited by the common-law rule against simultaneous holding of two incompatible offices.

No known Missouri statute prohibits one person from simultaneously holding the office of alderman and city collector of a fourth class city. We therefore turn to consideration of the common-law rule.

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first." State v. Bus, Mo., 36 SW 636, 637.

We therefore must determine whether the offices of alderman and collector of a fourth class city are incompatible. When are offices incompatible? What is the test?

The cases disclaim the existence of any universally applicable rule whereby a quick and accurate determination of compatibility vel non can be made. The determination must be made on a case-to-case basis. State v. Grayston, Mo., 163 SW2d 335, 339. Although there may be no universal rule of decision, there are however certain guides helpful in each determination. In an early Montana case, the court set out the following guides:

"Offices are 'incompatible' when one has power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."  
(Citations omitted) State v. Wittmer, Mont., 144 Pac. 648, 649..

Other cases have held offices to be incompatible when: a) one is subordinate to the other, b) one has supervisory power over the other, c) one has power of appointment or power of removal over the other, d) one audits the other's accounts. 67 C.J.S., Officers, §23, p.135. Mindful of these guides, what are the respective duties of alderman and collector in a fourth class city?

The collector in cities of the fourth class may be either an elective or appointive office. Section 79.050, RSMo Supp. 1961. Section 79.240, RSMo 1959, provides for the removal of officers in fourth class cities.

"The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the board of aldermen sitting as a board of impeachment. Any elective officer, including the mayor, may in like manner, for cause shown, be removed from office by a two-thirds vote of all members elected to the board of aldermen, independently of the mayor's approval or recommendation.

The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office any appointive officer of the city at will, and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The board of aldermen may pass ordinances regulating the manner of impeachments and removals." Section 79.240, RSMo 1959.

Thus, the board of aldermen has power of removal over the city collector.

Section 79.350, RSMo 1959, provides:

"The mayor or board of aldermen shall have power, as often as he or they may deem it necessary, to require any officer of the city to exhibit his accounts or other papers or records, and to make report to the board of aldermen, in writing, touching any matter relating to his office."

Section 79.310, RSMo 1959, requires the collector to make detailed reports to the board of aldermen. Section 94.320, RSMo 1959, provides the board of aldermen "shall require the collector . . . to make out, under oath, lists of delinquent taxes remaining due \* \* \* shall examine the lists carefully, and . . . shall approve the lists \* \* \*." Thus, the board of aldermen have power to supervise the collector, to audit his accounts, and to subordinate his actions to their approval.

In cities of the fourth class: the aldermen have power of removal over the collector; they have the power to audit his accounts and to require detailed reports of his official acts; they have power to supervise his acts and subject them to their approval. When the respective powers and duties of alderman and collector are compared to the guides set out by the courts supra, we cannot but conclude that the offices of alderman and collector in cities of the fourth class are incompatible and that it would be contrary to the public interest for one person to hold both offices simultaneously.



Honorable Daniel V. O'Brien -4-

CONCLUSION

From the above considerations, it is the opinion of this office that in cities of the fourth class one individual cannot serve simultaneously as alderman and as collector.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

LD:lt

AID TO DEPENDENT  
CHILDREN BENEFITS:  
COURT RECORDS:  
INSPECTION OF PUBLIC  
RECORDS:

- 1) Division of Welfare may grant A.D.C. benefits when parent is paroled with provision that he support his children.
- 2) The records of the St. Louis Court of Criminal Corrections concerning paroles are public records and open to public inspection.

June 6, 1963



Honorable T. D. McNeal  
State Senator  
Fourth District  
4772 Palm Street  
St. Louis 15, Missouri

Dear Senator McNeal:

On April 10, 1963, you requested an opinion from this office concerning the following two questions:

"1. When a father is paroled with the provision that he shall support his wife and family does the Division of Welfare have authority to grant benefits under the aid to dependent children provisions of the welfare law, if the actual amount of support being provided by the father is not sufficient to meet the needs of the dependent children and a needy eligible relative caring for such dependent children?

"2. Where the judgment and sentence of the St. Louis Court of Criminal Corrections shows that probation and parole has been granted on the condition of payment of full support with no amount specified, is the Division of Welfare entitled to inspect the records of the parole office of the Court of Criminal Corrections for the purposes of determining the amount of support required under the court's terms of probation or parole, and actually being paid thereunder, in order to determine the actual amount available to applicants for and recipients of benefits under the aid to dependent children program."



Statutes governing the Aid to Dependent Children program are to be found in Chapter 208, RSMo 1959.

Section 208.010, RSMo 1959, provides in part:

"In determining the eligibility of a claimant for public assistance under this law, it shall be the duty of the division of welfare to consider and take into account all facts and circumstances surrounding the claimant, including his living conditions, earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied. The amount of benefits, when added to all other income, resources, support and maintenance, shall provide such persons with reasonable subsistence compatible with decency and health in accordance with the standards developed by the division of welfare; \* \* \*."

This statute is referred to as the needs statute. An applicant for public assistance is required to meet other eligibility requirements as to age, residence and total property. If the applicant meets these statutory requirements, the applicant must also be found to be in need under the provisions of Section 208.010. *Howlett v. State Social Security Commission*, 149 SW2d 806; *Chapman v. State Social Security Commission*, 147 SW2d 157. It has been held that under the above statute it is the duty and responsibility of the Division of Welfare to determine whether an applicant is in need of public assistance before assistance can be granted. In order to determine this need, it is necessary for the Division of Welfare to make an investigation and determine the facts surrounding the living conditions of the applicant to determine whether need exists. In *Bratten v. State Social Security Commission*, 194 SW2d 536, after quoting the above statutes, the Springfield Court of Appeals stated l.c. 539:

"To ascertain these facts and circumstances the above section implies that the Commission has the right to make the necessary pertinent inquiries and the law contemplates personal contact with the applicant and the right to interrogate her as to her living conditions, earning power,

cost of support, property, etc. Parks v. State Social Security Commission, 236 Mo. App. 1054, 160 S.W.2d 823. Nevertheless, it is well established that the burden of proof is upon the applicant to show that he is qualified for benefits under the Act and in the absence of such proof application should be rejected. Chapman v. State Social Security Commission, 235 Mo. App. 698, 147 S.W.2d 157; Kelley v. State Social Security Commission, supra; Bare v. State Social Security Commission, Mo. App., 187 S.W.2d 519; Edwards v. State Social Security Commission, Mo. App., 187 S.W.2d 354."

In making this determination of need, it is necessary for the Division of Welfare to determine the amount of income and resources the applicant has as well as to know about all the necessary expenses and from this information, it is customary for the Division of Welfare to prepare a public assistance budget setting out all the expenses that the Division of Welfare determines to be necessary, together with the income in the home and the difference, if any, will represent the amount of the grant. This method has been approved by the appellate courts of this state. Kelley v. State Social Security Commission, 161 SW2d 661; Thornberry v. State Department of Public Health and Welfare, 295 SW2d 372, 365 Mo. 1217. These principles of law are to be applied in all public assistance cases including Aid to Dependent Children Benefits.

Under Section 208.040, RSMo 1959, it is provided that Aid to Dependent Children Benefits shall be granted to any needy child under the age of 18 who has been deprived of parental support or care by reason of death, continued absence from the home or physical or mental incapacity of a parent. It further provides:

"\* \* \*when benefits are claimed on the basis of continued absence from the home of a parent and such absence is due to divorce, desertion or nonsupport of a child by a parent, the division of welfare shall as a condition to granting of benefits require the claimant to initiate or prosecute legal proceedings

against the defaulting parent to secure support for such child, or through its investigation determine that the claimant has in good faith informed and assisted the proper authorities and made all reasonable efforts to apprehend the parent and charge him with the support of said child. \* \* \*

On January 24, 1963, this office issued an opinion to Mr. Proctor N. Carter, Director of the Division of Welfare, State Office Building, Jefferson City, Missouri, stating that it is not necessary that the defaulting parent be prosecuted as a condition precedent to the granting of Aid to Dependent Children Benefits as long as the Division of Welfare finds that the claimant has made all reasonable efforts and assisted the proper authorities in trying to secure support for the child. We further ruled in that opinion that the Division of Welfare has authority to make grants to supplement the income, resources, support and maintenance being received by the claimant or child when the income, resources and support being received are not adequate to provide a reasonable subsistence compatible with decency and health in accordance with the standards developed by the Division of Welfare. This opinion was based on the fact that the Division of Welfare had determined that the applicant for assistance had complied with this statutory provision for securing support from the defaulting parent.

The question you have submitted concerns the authority of the Division of Welfare to pay benefits when the defaulting parent has been paroled by a court with the provision that he support his wife and family when the actual amount of support provided is not sufficient to meet the needs of the child or children. The question is whether the Division of Welfare may under these conditions supplement the amount of support that the parent on parole actually furnishes under such conditions.

It is assumed that criminal charges have been filed against the defaulting parent as required by Section 208.040 because this would be necessary before the parole could be granted. The defaulting parent would have to be convicted either under a plea of guilty or after trial. The terms and conditions of the parole would rest entirely in the discretion of the court.

Under these circumstances, it would appear that the applicant for public assistance has complied with the provisions of the statute as to making all reasonable efforts to have the defaulting parent charged with the support of the child. Under such circumstances, if the amount of support actually furnished by the defaulting parent is not sufficient to meet the standard for a reasonable subsistence compatible with decency and health, the Division of Welfare may issue a grant to supplement that being received by the applicant. The mere fact that the defaulting parent is paroled under conditions that he support his child is of no consequence because that is merely declaratory of what he is already legally obligated to do under the law of this State. We are assuming that the defaulting parent is continuously absent from the home and that the children are deprived of support by reason of this fact.

In determining the amount of support that is actually being furnished, the applicant for assistance must cooperate with the Division of Welfare and furnish all information that is necessary and possible for the applicant to furnish in order that the Division of Welfare may determine whether the applicant is in need of public assistance. Failure to do so would justify the Division of Welfare in denying the applicant assistance. The applicant should not be charged with failure to do or provide something beyond the control of the applicant.

When the court grants a parole to the defaulting parent under conditions that such parent furnish full support and applicant contends that such parent is not making payments adequate to provide a reasonable subsistence compatible with decency and health not to exceed the statutory maximum under Section 208.150, RSMo 1959, the Division of Welfare may require the applicant to report the matter to the court or parole officer in order that the parole may be terminated. The Division of Welfare may deny assistance until this is done on the basis that the applicant has not made all reasonable efforts to secure support for the child or children. If the parole is terminated and the parent is incarcerated, the child or children would be eligible for aid during such period of incarceration. If, however, the court refuses to terminate the parole and payment adequate to provide a reasonable subsistence is not being furnished for the child or children, they would be eligible for assistance under such conditions not to exceed the statutory maximum under Section 208.150, RSMo 1959.



If a parole is granted on the condition that the parolee pay a definite sum of money for the support of the child or children and that amount is paid but such amount is insufficient to meet the reasonable needs of the children for a reasonable subsistence compatible with decency and health under the standard as developed by the Division of Welfare, the Division of Welfare then may supplement the amount of support that is actually being paid so that the amount received would be sufficient to meet the maximum set by Section 208.150, RSMo 1959.

In answer to the second question which you have submitted, Article VY Section 1, Constitution of Missouri, 1945, provides that the judicial power of the state shall be vested in the Supreme Court and certain other courts named therein, including the St. Louis Court of Criminal Corrections. Implementing this constitutional provision is Section 479.010, RSMo 1959, establishing the St. Louis Court of Criminal Corrections, consisting of two divisions which shall be a court of record.

All official acts of a court of record must be made of record by the court before they become official. State ex rel. Gentry v. Westhues, 286 SW 396, 315 Mo. 672; Medlin v. Platte County, 8 Mo. 235. Whatever proceedings the law or practice of the court requires to be entered constitutes a part of the official court record. State ex rel. v. May Department Stores, 38 SW2d 44, 327 Mo. 567.

Section 109.180, Mo. Cum. Supp. 1961, provides in part that except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri and those in charge of the records shall not refuse the privilege to any citizen. It further provides for removal of the officer and makes it a misdemeanor for any officer to violate this provision. There is no provision of law that exempts the records of the St. Louis Court of Criminal Corrections from public inspection.

We are enclosing herewith an opinion issued by this office on February 5, 1963, to Honorable Loicen O. Boyd, Prosecuting Attorney of Worth County, interpreting Section 109.180 and Section 109.190, Mo. Cum. Supp. 1961.



CONCLUSION

1) It is our opinion that when a father is paroled with the provision that he support his children, the Division of Welfare may grant assistance in addition to that which is actually furnished to meet the needs not to exceed the maximum provided in Section 208.150, RSMo 1959.

2) It is our opinion that the records of the St. Louis Court of Criminal Corrections are open to public inspection concerning the granting and conditions of the parole as well as all official records kept by the parole officer concerning the amount of money that is paid under the terms of the parole and that the Division of Welfare is entitled to inspect such records.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

MM:lt

April 19, 1963



Honorable Charles G. Hyler  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Mr. Hyler:

This is in answer to your letter of April 16, 1963, in which you request an opinion of this office concerning the assessment of certain vehicles.

We are enclosing for your information a copy of an opinion of this office issued on March 7, 1949, to Honorable Clarence Evans, Chairman, State Tax Commission of Missouri, Jefferson City, Missouri, and a copy of an opinion of this office issued January 25, 1962, to Honorable John A. Williams, Chairman, State Tax Commission, Jefferson Building, Jefferson City, Missouri.

These opinions hold that the tangible personal property is to be assessed in the county of the owner's residence rather than in the county in which the property may be located. In effect, the assessment of the vehicles in your letter would then depend upon the residence of the owner of the vehicles. We point out that these opinions do not deal with corporate property and that vehicles owned by corporations would be covered by Section 137.095, RSMo 1959.

I trust that these previously issued opinions which we are sending in this letter will be sufficient to answer your question without the necessity of issuing a formal opinion to you on this matter.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

WW:lt  
Enc.

LEGISLATION: The emergency clause appended to H.B. No. 83,  
CONSTITUTIONAL LAW: 72nd General Assembly (which is an act to in-  
MOTOR VEHICLES: crease truck weight limits and registration  
TRUCKS: fees), is invalid since said act is not  
"necessary for the immediate preservation of  
the public peace, health or safety," as provided in Section 52,  
Article III, Missouri Constitution.

April 23, 1963

#171

Honorable M. E. Morris  
Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Morris:

We have your letter of April 17, 1963, wherein you inquire as to the effective date of House Bill No. 83 of the 72nd General Assembly, recently signed by Governor Dalton and returned to the House of Representatives with a message expressing the Governor's doubts concerning the efficacy of the emergency clause appended to the Bill.

H.B. No. 83 repeals Section 304.180, RSMo 1959, relating to the weight of motor vehicles, and enacts a new section relating to the same subject in lieu thereof, and amends Section 301.060, RSMo 1959, relating to registration fees of motor vehicles. The purpose of the Bill is to increase the permissible weight of commercial motor vehicles traveling on the state's interstate and primary highway system and to provide for a corresponding increase in the registration fees paid for vehicles of the heavier weights. The new law increases the greatest allowable gross weight from 64,650 pounds to 73,280 pounds and raises the maximum annual registration fee from \$800.00 to \$1,050.00. A schedule of intermediate weights and fees is also provided.

In determining the effective date of an act such as this, containing an emergency clause, Sections 29 and 52 of Article III of the Constitution must be considered. These sections are as follows:

Section 29. "No law passed by the general assembly shall take effect until ninety days after the adjournment of the session

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at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Section 52(a). "A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded."

It can be seen that while Section 29 provides that an act may become effective sooner than ninety days after the adjournment of the legislative session upon a declaration of emergency by two-thirds of the membership of each house, Section 52 reserves to the people, for a period of ninety days after adjournment, the right of referendum over all bills except those "necessary for the immediate preservation of the public peace, health or safety" (and certain others not material here). These two constitutional provisions were first considered in a case involving an emergency clause by our Supreme Court in *State ex rel. Westhues v. Sullivan*,

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283 Mo. 546, 224 SW 327. In that case, the Court held that the two provisions must be construed together and that, in order to be effective, the legislative declaration of emergency provided by Section 29 must be such as will meet the Section 52 standard of "necessary for the immediate preservation of the public peace, health or safety." Whether that standard has been met is a judicial question, said the Supreme Court, and the courts are obliged to look behind the legislative statement of emergency to determine if the act in question is so necessary to the immediate preservation of the public peace, health or safety as to warrant a denial of all possibility of a referendum in order to give immediate effect to the act. Otherwise, the Court pointed out, the right to refer legislative enactments, guaranteed the people by the Constitution, could be made subject to a mere statement of emergency by the Legislature, whether or not such an emergency existed in fact. The constitutional referendum would thus become a legislative referendum. The Supreme Court then proceeded to examine the alleged emergency measure before it (the Workmen's Compensation Act of 1919) and held that it did not present an emergency situation within the meaning of Section 57 of Article IV of the Constitution of 1875 (now Sec. 52 of Art. III, *supra*), and was therefore referable by the people.

The conclusion reached in the Sullivan case that an emergency declared by the Legislature under Section 29 may not accelerate the effective date of a law unless it meets the test of an emergency under Section 52 has been consistently followed in a series of subsequent cases. State ex rel. Pollock v. Becker, 289 Mo. 660, 233 SW 641; Fahey v. Hackmann, 291 Mo. 351, 237 SW 752; State ex inf. Barrett v. Maitland, 296 Mo. 338, 246 SW 267; State ex rel. Harvey v. Linville, 318 Mo. 698, 300 SW 1066.

Our Court has also ruled against the contention that an act may become immediately effective as an emergency measure under Section 29 and still be subject to a referendum as provided in Section 52, stating, in State ex rel. Moore v. Toberman, 363 Mo. 245, 250 SW2d 701, 706, that:

"Moreover, § 52(b) clarifies beyond question the intendment and scope of the referendum provided in § 52(a). It provides: '\* \* \* Any measure referred to the people shall



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take effect when approved by a majority of the votes cast thereon, and not otherwise.' This is a clear declaration that the referendum provided for in 52(a) is not intended to apply to laws that have become effective."

Similarly in State ex rel. Westhues v. Sullivan, supra, the Court said (l. c. 335):

"That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment [now Section 52(b)] which reads, 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,' clearly means that a law upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for 90 days after the adjournment of the session or its approval by vote."

The decisions in Sullivan and subsequent cases were summarized in the most recent case on this subject, State ex rel. City of Charleston v. Holman, Mo., 355 SW2d 946, where the Court said (l. c. 950):

"In 1920, this court, in construing the purpose and effect of provisions of the Constitution of 1875 from which the above quoted §§ 29 and 52(a), Article III, of our present constitution are taken, held they, of necessity, were to be read and considered together. And so construing them, it was further held that no act subject to the referendum provisions of § 52(a) could go into effect earlier than 90 days

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after the adjournment of the session at which it was enacted; that neither could an act subject to referendum be made effective at an earlier date by the mere legislative declaration than an earlier effective date was necessary for the immediate preservation of the public peace, health or safety; and that the courts are vested with the right and duty to measure the act 'by the yardstick of the constitution' and determine whether in fact its provisions are 'necessary for the immediate preservation of the public peace, health or safety.' \* \* \*

From the foregoing, we conclude that a legislative declaration of emergency does not render an act immediately effective unless it is "necessary for the immediate preservation of the public peace, health or safety" that the act be given immediate effect; and that the legislative declaration is not binding but is open to inquiry to determine whether the Section 52 test has been met.

The emergency clause appended to H.B. No. 83 reads as follows:

"Section 3. Since the present laws governing maximum vehicle weights seriously interfere with the movements of essential products to and from industry, business and agriculture which are necessary for the immediate preservation of public peace, health, safety, and general welfare, the General Assembly hereby declares an emergency exists within the meaning of the Constitution, and this Act shall become effective upon passage and approval."

No doubt the removal of the handicap imposed upon the trucking industry by the present weight limits will result in many benefits for Missouri. The transportation services performed by commercial motor vehicles are extremely important to the economy of the state, and the passage of H.B. No. 83 will make possible a substantial enlargement of these services. The question remains, however, whether the increase

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in maximum weight limits and the resulting revenues derived from the increased registration fees provided in H.B. No. 83 are of such vital importance to the immediate preservation of the public peace, health or safety that the Bill may be given immediate effect and the referendum guaranteed by the Constitution thus avoided. For some years, trucks have been required to observe our present weight limits without apparent damage to the public peace, health or safety. This holds true even though in recent years the current restrictions have become particularly burdensome due to increased weight limits in adjoining states. It can hardly be said that an increase of some 13% in maximum truck weights is necessary to meet an immediate threat to the public peace, health or safety when no such threat was apparent prior to the enactment of the increase.

A somewhat related situation is found in State ex rel. State Highway Commission v. Thompson, 323 Mo. 742, 19 SW2d 642, wherein the Court considered an act authorizing the issuance of \$7,500,000 in bonds to provide for the completion of the state highway system, and other matters. An emergency clause was appended to the bill and our Court held this clause did not meet the standard of Section 52. The Court said (l. c. 647):

"\* \* \* The early completion of the state highway system, the reimbursement of counties for money expended on the state highway system, the relief from congestion of traffic in areas adjacent to St. Louis and Kansas City, and a beginning of supplementary state highways in counties, are all desirable, and when accomplished will no doubt greatly contribute to the public welfare, and indirectly promote the public peace, health and safety. But it cannot be affirmed that any of these things are necessary for the immediate preservation of the public peace, health or safety.  
\* \* \*"

Certainly the trucking industry could not function without a highway system, and yet the Court held that the construction of such a system is not of such vital necessity as to

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warrant the giving of immediate effect to the act.

In *Fahey v. Hackmann*, 291 Mo. 351, 237 SW 752, the General Assembly passed a veterans' benefit bill with an emergency clause which stated that many of the intended beneficiaries of the act were not employed and were in dire need of the benefits sought to be provided them in the act. The Supreme Court held that the emergency clause was ineffectual, saying (l. c. 761):

"It is by virtue of this clause that proposed action under the law at this time is threatened. We regret to postpone the disposition of this fund, so richly deserved by the beneficiaries thereof, for even the short space of six or seven weeks, but we feel that the heroes entitled to the fund would not ask us to run counter to former judicial determinations in order to save this short space of time."

Applying the consistent line of thinking developed by the Supreme Court in the cases heretofore cited, we must necessarily conclude that, desirable as the implementation of H.B. No. 83 may be, it cannot be said to be necessary to the immediate preservation of the public peace, health or safety, and thus cannot be given immediate effect. This being the case, H.B. No. 83 will become effective in the normal course as provided in Section 29 of Article III, so that its effective date will be 90 days after the adjournment of the present legislative session, or October 13, 1963.

#### CONCLUSION


It is the opinion of this office that the emergency clause appended to H.B. No. 83, 72nd General Assembly, does

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not meet the constitutional standard set out in Section 52, Article III, Missouri Constitution; that an act to be given immediate effect must be "necessary for the immediate preservation of the public peace, health or safety" and said emergency clause is therefore invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,

  
THOMAS F. EAGLETON  
Attorney General



**CITIES OF FOURTH CLASS:** Marshal elected in April, 1963, in Fourth Class City of Grandview, Missouri, may not serve or be paid an additional salary as a patrolman member of the police department of such city. Such offices incompatible due to fact that office of patrolman is subordinate and accountable to office of marshal. Such marshal may not be paid an additional salary as chief of police.

May 24, 1963

OPINION NO. 172

Honorable John L. Fitzgerald  
Member, Missouri House of Representatives  
State Capitol Building  
Jefferson City, Missouri



Dear Mr. Fitzgerald:

This opinion is rendered in reply to two inquiries directed to you on April 8th and 10th by the City Attorney of Grandview, Missouri, the latter letter stating the questions in the following language:

"My question at this time is whether the City of Grandview, a fourth class city, can pay an elected Marshall a fixed salary, and subsequent to election, pay an additional salary as a Patrolman, or whether this is a subordinate position and therefore he would be prohibited as serving as a Patrolman. My further question is whether he can receive a salary as Chief of Police, since the State Statutes state that the Marshall shall also be a Chief of Police."

Statutes generally applicable to cities of the Fourth Class are found at Chapter 79, RSMo 1959. Section 79.050, RSMo Cum. Supp. 1961, provides:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an

election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified."

It has been established that the present marshal of Grandview was elected in April, 1963, pursuant to authority found in Section 79.050, RSMo Cum. Supp. 1961, effective October 13, 1961; that no issue has been submitted to the electorate under that statute; and no ordinance has been passed providing that the same person may be elected marshal and collector. In the April, 1963 election different persons were elected to the offices of marshal and collector.

Since the board of aldermen of Grandview has not employed the statutory procedures outlined in Section 79.050, RSMo Cum. Supp. 1961, by which a chief of police would be appointed to "perform all duties required of the marshal by law," and by which "the same person may be elected marshal and collector," we must conclude that the only mandatory directive found in this statute which has been complied with is that "a city marshal and collector shall be elected."

Two statutes bearing significantly on this question are found at Sections 85.610 and 85.620, RSMo 1959, and we here quote them in full:



"85.610. Marshal--powers (fourth class cities).--The marshal in cities of the fourth class shall be chief of police, and shall have power at all times to make or order an arrest, with proper process, for any offense against the laws of the city or of the state, and to keep the offender in the city prison or other proper place to prevent his escape until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process, in all cases in which any offenses against the laws of the city or of the state shall be committed in his presence."

"85.620. Size of police force (fourth class cities).--The police of the city may be appointed in such numbers, for such times and in such manner as may be prescribed by ordinance. They shall have power to serve and execute all warrants, subpoenas, writs or other process, and to make arrests in the same manner as the marshal. The marshal and policemen shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city."

In the 1949 revision of Missouri's statutes, Sections 85.610 and 85.620, RSMo 1959, quoted above, were removed from the group of statutes now found at Chapter 79, RSMo 1959, pertaining to "cities of fourth class" and placed in what is now Chapter 85, RSMo 1959, pertaining to "city police and fire departments generally," but they remain particularly applicable to cities of the fourth class.

When we notice the requirement of Section 85.610, RSMo 1959, that "the marshal in cities of the fourth class shall be chief of police," and read the same with the requirement found in Section 79.050, RSMo Cum. Supp. 1961,

that the chief of police "shall perform all duties required of the marshal by law," we find two statutes which are wholly compatible and one complements the other in this regard.

When Section 79.050, RSMo Cum. Supp. 1961, and Section 85.610 RSMo 1959, are read together we must conclude that the elected marshal of a Fourth Class city is chief of police by virtue of his election in those instances where the board of aldermen does not provide for appointment of a chief of police. Where appointment of a chief of police is made as provided for in Section 79.050, RSMo Cum. Supp. 1961, the chief of police takes on "all duties required of the marshal by law," and only in such instance is the election of a marshal dispensed with.

The analysis made, supra, of Section 85.610 RSMo 1959, and Section 79.050, RSMo Cum. Supp. 1961, demonstrates that one and only one person is authorized by law to be the chief of police and marshal of a Fourth Class city. We now turn to the first question posed as to the right of Grandview, a Fourth Class city, to pay its marshal an additional salary as a patrolman.

Under Section 79.050, RSMo Cum. Supp. 1961, the marshal elected in the City of Grandview in April, 1963, was elected for a definite term of two years. Section 79.270 RSMo 1959, provides:

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.290 RSMo 1959, provides:

"The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance. And bonds may be required of any such officers for faithfulness in office in all respects."

We have heretofore set forth Section 85.620 RSMo 1959, applicable to cities of the Fourth Class, which provides that "the police of the city may be appointed in such numbers, for such times and in such manner as may be prescribed by ordinance." Such statute also provides that "the marshal and policemen shall be conservators of the peace. \* \* \*" No ordinances are before us outlining the duties of marshal as they may be related to the duties and responsibilities of patrolmen or policemen. However, common experience demonstrates that a chief of police occupies a position distinct and different from that held by patrolmen or policemen under his jurisdiction. Whatever rules may be laid down by ordinance affecting the police department, the position of chief of police connotes a position or office having supervisory jurisdiction over the positions or offices of patrolmen or policemen. In consideration of such established fact, we must conclude that the office of marshal of a city of the Fourth Class in Missouri is incompatible with the positions of patrolmen or policemen of such city due to the fact that patrolmen and policemen hold positions subordinate to the marshal as chief of police and are accountable to such superior officer. Such conclusion is well within the rule stated as follows from State v. Grayston, 349 Mo. 700, 1.c. 708, 163 SW2d 335:

"The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Turning now to your second question. May the marshal elected in April, 1963, receive an additional salary as chief of police? Section 79.270 RSMo 1959, applicable to Fourth Class cities provides:



"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.270 RSMo 1959, quoted above, may be said to implement Article VII, Section 13 of Missouri's constitution reading as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It has been previously disclosed, by quoting Section 79.050 RSMo Cum. Supp. 1961, that the elected marshal of a Fourth Class city is elected for a definite term of two years. Since we are dealing with the single office of marshal, who is chief of police, any ordinance enacted after the election of such officer to grant him additional salary as chief of police would be in violation of Article VII, Section 13 of Missouri's constitution and contravene Section 79.270 RSMo 1959.

#### CONCLUSION

It is the opinion of this office that the marshal elected in April, 1963, in the Fourth Class city of Grandview, Missouri, may not be paid an additional salary to serve as a patrolman member of the police force of such city since the two offices are incompatible by reason of the office of patrolman being subordinate and accountable to the office of marshal and chief of police. Such marshal may not be paid an additional salary as chief of police.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

INSURANCE:

Articles of Incorporation of  
General Life of Missouri Insurance Company

OPINION NO. 174

April 18, 1963



Honorable Jack L. Clay  
Superintendent of the  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of April 17, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed General Life of Missouri Insurance Company, which Declaration of Intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JLO'M:df

April 12, 1963

Opinion No. 175 Answered by Letter

Honorable Hubert Wheeler  
Commissioner of Education  
State Department of Education  
P.O. Box 480  
Jefferson City, Missouri



Dear Mr. Wheeler:

We have your opinion request regarding the St. Louis County Special School District especially as related to students with speech defects. It appears that in 1958 your department set up a policy with respect to speech defective students whereby state aid was given to the Special District under which policy teachers went to schools not operated by the Special District and gave speech instruction to students needing such training.

We understand that as of now there are approximately 2700 students receiving such instruction; that theoretically and for the purpose of receiving state aid these students are accounted for in units or "classes" of between 80 to 120 students although in fact there are no such classes; that there are currently approximately 30 such state-aid units for which the state gives aid of \$2,800 each or \$84,000 annually.

We presume that your policy will be to continue this program. If so, then we presume that you will set up a similar accounting system of units from 80 to 120 to cover the other students not presently receiving speech instruction who reside in the Special District and who seek such similar instruction. Such a program as an extension of the one already established by your department in 1958, we would deem to be legally tolerable and defensible in the event any litigation might arise questioning same.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

July 26, 1963



Honorable R. J. King, Jr., Member  
Missouri House of Representatives  
39 Ridgemore Drive  
Clayton 5, Missouri

Dear Mr. King:

Your request of April 15, 1963, for the opinion of this office posed a question whether a political subdivision of Missouri, after having called for bids on insurance coverage, could reject the bid of a mutual insurance company when such bid reflected a sum representing an estimated, but undeclared dividend for the policy period. On the face of your inquiry it was disclosed that the question you submitted was posed to you by a member of a large insurance agency.

On April 19, 1963 this office indicated to you, by letter, that a preliminary survey would be made to determine unknown factors entering into this picture. Investigation discloses that the inquiry involves the writing of automobile casualty coverage as distinguished from fire and comprehensive coverage on residential or commercial properties, and that the particular type of political subdivision involved was a sewer district.

The only data this office has obtained to date in relation to the question you submitted is that compiled with reference to sealed proposals invited by the Metropolitan St. Louis Sewer District on January 9, 1963. Of eleven bids submitted pursuant to the invitation of January 9, 1963 only one bid was submitted by or on behalf of a mutual company. Such bid reflected on its face a total gross annual premium for the proposed coverage, accompanied by an estimated current dividend to be deducted from the gross premium, resulting in a net annual premium. We accept such bid as reflecting the factual situation to which



Honorable R. J. King, Jr., - 2.

your question was addressed.

We have found no statute prohibiting this type of bidding. On its face the bid reflects the base cost of the coverage to the political subdivision. The estimated dividend is undeclared and speculative but bears no character of deception. Your question goes to the right of the political subdivision to reject the bid, rather than to its right to accept it. It is interesting to note that the person posing the question to you in the first instance was an officer of the insurance agency finally receiving the business which was the subject of bidding pursuant to the invitation of January 9, 1963, and that such agency was placing the coverage with a stock company rather than a mutual company.

In your letter of inquiry you stated that "Several political subdivisions have thrown out such bids, advising these companies that they could not accept anticipated dividends as a firm bid." Such a stated reason for rejecting the bids seems to reflect sound business judgment, and no doubt the officers of the political subdivisions involved were fully acquainted with the basic statutes governing their political subdivisions, and found no directive in those statutes requiring that they accept such bids embracing a speculative factor. We notice that the invitation for bids extended by the Metropolitan St. Louis Sewer District on January 9, 1963 recited that "The District reserves the right of selecting the proposal that in its opinion is best." We have established the fact that the Metropolitan St. Louis Sewer District is a political subdivision established by constitutional authority (Mo. Const. Art. VI, Sections 30(a) and 30(b)), with full power to enact ordinances to insure orderly administration of the political subdivision. We have no evidence at hand to disclose that the Metropolitan St. Louis Sewer District was without authority to reject the bid of the mutual insurance company submitted in answer to the invitation for bids submitted on January 9, 1963. Reference has been made to the Metropolitan St. Louis Sewer District solely because such political subdivision was the only one specifically brought to light in the preliminary examination we made touching your question.

You are fully aware of the different types of political subdivisions in our State government, and of the fact that their powers differ in many respects. It does not seem feasible to search all such statutes to determine the authority of one or all of these political subdivisions to reject the type of insurance coverage bid submitted by the mutual company in answer to the invitation for bids made on January 9, 1963. No statute of general application affecting the acceptance or rejection of bids touching



Honorable R. J. King, Jr., - 3

the cost of construction or maintenance of properties of political subdivisions has been found.

If you feel that this letter of advice, in lieu of a formal opinion, directed to your inquiry presents an unreasonable approach to the real problem, this office will be pleased to search the statutes relating to powers of any particular political subdivision you may describe.

Yours very truly,

JLO:df

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THOMAS F. EAGLETON  
Attorney General

October 11, 1963



Honorable Charles D. Trigg  
Comptroller and Budget Director  
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested our opinion concerning the liability of the state for certain items included in the list of expenses certified to you by the Board of Election Commissioners of St. Louis County, Missouri, following the special election held on March 6, 1962. At that election a question was submitted to a vote of all the electors throughout the state. No other question was submitted for a vote in St. Louis County at the same election. Section 111.405, RSMo., provides that in such situation "all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of any moneys appropriated by the legislature for that purpose."

The certification by St. Louis County contains thirteen items of costs. The first six of these items are not questioned. The precise question with which you are concerned involves the construction of the statutory phrase "all costs of such election." The statute does not define the phrase and we have found no case which contains a definition thereof applicable to the instant facts. It is clear, however, that the Legislature intended to distinguish between those costs which constitute part of the administration of the office of whatever official performs the duties of conducting elections and those expenses which are specifically incurred therefor.

In our opinion, the phrase "costs of such election" means all those costs which in no event would have been incurred but for the election. By way of example, items such as salaries of judges and clerks of election, rent of polling places and the cost of printing ballots would in no event

Honorable Charles D. Trigg

have been incurred but for the election. In this frame of reference we have considered each of the Items 7 to 13, inclusive, and have concluded that Items 7 to 11, inclusive, may properly be deemed "costs of such election" but that Items 12 and 13 do not constitute part of such costs.

Items 7 to 11 may be considered together inasmuch as they all relate to a pre-election canvass. A part of Item 7 (which we are informed amounts to \$18.48) is for postage for absentee ballots, an expense which in any view is part of the costs of the election. The balance of Item 7, amounting to \$869.34, is for postage in connection with the pre-election canvass.

Section 113.210, RSMo., paragraph 5, applicable only to St. Louis County, specifically provided:

"The board of election commissioners shall order a canvass of all registered voters not later than three weeks before each election and revise each canvass in the same manner as provided for in sections 113.010 to 113.420."  
(Emphasis supplied)

It is to be noted that paragraph 3 of that section, 113.210, specifically refers to special elections in fixing the closing date of registration. And Section 213.290, RSMo., specifically provided for a revision of the registration preceding special elections and the latter section refers to the duty of the canvassers during such revision.

When all of these statutes are read together as part of a consistent whole, it is clear that the Board of Election Commissioners of St. Louis County was required to order a canvass before any special election as well as to order a canvass before any general or primary election. Therefore, such board was under the specific statutory duty to order a canvass before the special election of March 6, 1962, and solely by reason thereof.

Parenthetically, it is to be noted that Section 113.210 was amended by the 72nd General Assembly (Senate Bill 333) so that in the future a canvass will be required in St. Louis County only before general and primary elections. The effect of the amended section, which goes into effect October 13, 1963, is

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to eliminate any requirement of a canvass preceding a special election and further evidences the legislative recognition that theretofore such a canvass was mandatory.

In view of the fact that the pre-election canvass ordered and held by the Board of Election Commissioners of St. Louis County was in terms specifically required by statute as part of the election procedure, the board had no discretion in the matter. And it is our opinion that the costs of such canvass constitute part of the costs of the special election. The canvass, as required by Section 113.270, RSMo., was conducted by the clerks of election rather than by the board's employees as such. The costs thereof would in no event have been incurred but for the election.

It follows that Item 10 (amount paid for salaries of the canvass clerks), Item 9 (the cost of printing forms used in the canvass), Item 8 (cost of preparation of voter registration lists for the canvass), and Item 7 (that portion thereof for postage in connection with the canvass), all of which were part of the costs necessarily incurred in conducting the mandatory pre-election canvass and which in no event would have been incurred but for the election, are proper items of expenses constituting part of the costs of the election for which the state is liable.

Item 11 (\$556.80) is the amount paid for automobile mileage allowed canvassers in pre-election canvass. Our investigation has revealed that the Board of Election Commissioners authorizes such mileage allowances to be paid in those instances only where it is necessary to enable the canvassers to perform their duties as required by the statute. It is to be noted that St. Louis County covers a total area of some 496 miles, and as the board has pointed out to this office "it would be impossible to conduct a canvass in many of our precincts without the extensive use of transportation facilities." Such mileage allowances are not made as a matter of course but only where they are found necessary in order to conduct a proper canvass within the period of time allotted. Viewed in this light, it is our opinion that such mileage payments constituted expenses incurred in the necessary fulfillment of the statutory duty of conducting the pre-election canvass, and therefore Item 11 is a proper item of expense constituting part of the costs of the special election for which the state is liable.

Honorable Charles D. Trigg

Item 12 is the amount paid for salaries of "temporary employees in Election Board Office" during the period February 1 to March 9, inclusive. The Board of Election Commissioners of St. Louis County is authorized by statute to employ assistants and clerks in order to enable such board properly to perform its statutory duties. We find no statutory limitation upon the number of such assistants and clerks, except with respect to those who are paid monthly on a yearly basis. "All other assistants, if any, employed by the board" are paid on a daily basis. Section 113.180, RSMo., authorizes a maximum number of employees who are paid monthly and the board has informed us that it employs such maximum number as a regular policy. However, the volume of work incident to the conduct of a registration, canvass and election is greater than can be handled by the total number of assistants and clerks paid monthly, and for such reason additional assistants on a daily basis were employed to share the work load.

The board has designated the employees paid monthly as "regular" employees and those employed on a daily basis as "temporary" employees. Item 12 refers to the latter group of employees. In our view, such assistants are "temporary" only in the sense that their services were discontinued shortly after the special election was held. They are no more "temporary" than would be additional assistants and clerks employed on a monthly basis if the statute had authorized a greater number of such assistants. Parenthetically, Section 113.180 as amended by the 72nd General Assembly, effective October 13, 1963, now authorizes an additional twenty-four clerks in the category the board designates "regular," but does not affect the board's authority to employ additional assistants payable on a daily basis.

The determination of the proper number of clerks and assistants necessary to enable the board to carry out its prescribed duties is within the administrative discretion of the board, whether such employees are those paid on a monthly or on a daily basis. The services performed by those assistants paid on a daily basis are no different than those performed by the assistants and clerks paid at a monthly rate, and the amounts paid them as compensation on a daily basis no more constitute part of the costs of the election than do the amounts paid these assistants and clerks employed at a monthly rate.



Honorable Charles D. Trigg

While it is no doubt true that the additional work load resulting from an intermediate registration, canvass and election was a major factor (if not the sole factor) in the board's decision to employ additional assistants, the expense incident thereto does not constitute a direct cost as such of the election. The increase in the number of assistants and the cost thereof cannot be said to be such as would in no event have resulted or been incurred but for the election. That is, had the number of the so-called "regular" employees authorized by the statute in 1962 been greater, it is obvious that the "temporary" employees would not have been employed. Hence, their employment resulted from the fortuitous circumstance that the number of "regular" employees were insufficient to handle the work load in the judgment of the board.

In this connection, we take note of a statement made by the board to the effect that a part of the increased work load resulted from holding an intermediate registration which "would tend to add to such work because of an increase in the number of new registrations to be processed." As indicated above, the pre-election canvass is not conducted by the board's assistants, either "regular" or "temporary," but by clerks of election, so that the cost thereof is an identifiable cost which could not have been incurred but for the election. On the other hand, the amount paid as compensation to assistants and clerks of the board is not identifiable as specifically incurred for the election.

The remaining Item 13 (\$603) is the amount paid for supper money allowance to employees on the "regular staff" of the election board during a period of overtime work. Without regard to whether the board has authority to make such allowance, it is clear that such item is not a cost which in no event would have been incurred but for the election. It resulted from the fact that the board required the overtime work of its monthly employees rather than employ additional assistants on a daily basis. We do not believe that such item is any more a cost of the election than would be a payment of lunch money to the same employees. In any event, what we have said as to the liability of the state for the cost of the additional assistants employed on a daily basis is determinative of this issue.

Summarizing, it is the opinion of this office that the state is liable for the payment of Items 7 to 11 inclusive, and is not liable for the payment of Items 12 and 13 of

Honorable Charles D. Trigg

the amounts certified by St. Louis County in connection with  
the special election of March 6, 1962.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:BJ

COUNTIES:	County planning commission not
COUNTY COURTS:	authorized to issue building permits.
PLANNING COMMISSIONS:	Such permits must be issued by
ZONING COMMISSIONS:	enforcement officer appointed by
PLANNING AND ZONING	county court after county court
COMMISSIONS:	adopts zoning order.

OPINION NO. 181

June 17, 1963

Honorable Earl R. Blackwell  
State Senator, 22nd District  
Senate Post Office  
Jefferson City, Missouri



Dear Senator Blackwell:

This is in response to your recent request for an opinion of this office, which request reads in part as follows:

"I would appreciate an opinion from your office on the following question.

"Does the planning commission in a county of the second class have the power to issue building permits authorizing the erection of privately owned buildings? If the planning commission does not have this authority, is there any procedure whereby the county court in such a county make and enforce such zoning regulations?"

In a letter of this office issued to the Honorable William B. Milfelt on September 5, 1962, it was ruled that once an election is conducted as provided for in Section 64.530, RSMo 1959, the county court has a choice as to whether the zoning provisions or planning provisions, or both, of Sections 64.510 to 64.690 will be put into effect. A copy of that letter is enclosed herewith.

Upon the premise established in the Milfelt opinion, building permits authorizing the construction of privately

owned structures may be issued only after the procedures set out in Sections 64.640 and 64.650 have been followed. That is to say, if the county court is desirous of invoking the zoning powers set out in Sections 64.620 through 64.690, it is necessary that where a planning commission already exists, the commission be requested by the county court to recommend boundaries of districts and appropriate regulations. After the necessary hearings, the county court may adopt the proposed zoning order "with or without change or may refer it back to the commission . . ."

Section 64.650 provides that after such a zoning plan is adopted by the county court, an officer is appointed by the county court to enforce the zoning order and to issue building permits.

The answer to your first question must, therefore, be in the negative insofar as the planning commission itself is concerned. However, the power of such a county to avail itself of the protection of the statutes referring to zoning powers is clear.

A printing error in Section 64.650, RSMo 1959, should be pointed out so as to avoid confusion if the county concerned here adopts a zoning order. The first sentence of that section concludes with the phrase "to enforce the provisions of Section 64.510." Reference to House Bill 465, 66th General Assembly, L.1951, page 406, 412, Section 12, reveals that the initial sentence of this section correctly reads as follows:

"Any county court which has adopted a zoning plan, as provided herein, shall appoint an officer or shall designate one of the existing officials to enforce the provisions of this act."

Since that "act" brought into existence the sections set out in the Revised Statutes of Missouri of 1959 as Sections 64.510 through 64.690, it is clear that the duties of the officer appointed under Section 64.650 will encompass the enforcement of the zoning provisions of all those sections.

Conclusion

It is, therefore, the opinion of this office that a planning commission does not have power to issue building permits which authorize the erection of privately owned buildings in a county of the second class wherein planning and zoning have been adopted by vote of the people. Such permits may be issued by an enforcement officer, but only after a zoning plan has been duly adopted by the county court and the enforcement officer appointed or an existing official designated.

This opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours

THOMAS F. EAGLETON  
Attorney General

AJS:im



April 29, 1963



Honorable Peter J. J. Rabbitt  
State Representative  
State Capitol  
Jefferson City, Missouri

Dear Mr. Rabbitt:

This refers to your letter of April 23, 1963, which reads as follows:

"This is a request for your opinion as to the effects of an amendment in Senate Bill No. 26. This bill was introduced to provide for the non-partisan court plan in St. Louis County. My question is what would be the constitutionality of the bill if amended in the house to extend to Clay County or to any other counties."

In view of your statement concerning the purpose of Senate Bill No. 26 as the bill was introduced, we assume that you have in mind the question whether an amendment such as you describe would violate the following provision of Article III, Section 21, Constitution of Missouri:

"\* \* \* and no bill shall be so amended in its passage through either house as to change its original purpose."

If this is true, we must point out that your inquiry is based upon a false premise as to the purpose of Senate Bill No. 26. As that bill was originally introduced, it provided for the extension of the non-partisan court plan to all judicial circuits to which it does not now apply. It was by amendment in the Senate that the scope of the bill was so restricted that, under existing facts, it would provide only for the extension of the non-partisan

Honorable Peter J. J. Rabbitt

court plan to St. Louis County. In view of these facts, it would appear clear that an amendment in the House to again broaden the scope of the bill to make it apply to additional judicial circuits could not violate the constitutional provision quoted above.

There is enclosed, for your information, a copy of my letter of February 5, 1963, to Senator Waters in which I discussed certain constitutional questions with respect to Senate Bill No. 26 which were raised prior to Senate action on the bill.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

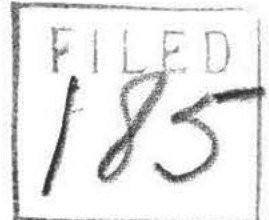
JCB:BJ

LIBRARIES:  
COUNTY LIBRARIES:  
COUNTY LIBRARY DISTRICTS:  
STATE AID:

Persons residing on Federal military bases within the boundaries of county library district are residents of such district entitled to library services and are to be counted in determining county library district population for purposes of state aid.

OPINION NO. 185

November 27, 1963



Honorable Paxton P. Price  
State Librarian  
State Office Building  
Jefferson City, Missouri

Dear Mr. Price:

This is in answer to your letter requesting an official opinion of the Attorney General and reading as follows:

"Pulaski, Johnson and Cass counties have established county library districts. Are Ft. Leonard Wood (Pulaski County), Whiteman Air Force Base (Johnson County) and Richards-Gebaur Air Force Base (Cass County) within their respective county library districts, which are financially supported from county and state funds, and are these library districts responsible for providing library services to these aforementioned areas?"

Section 182.010, Revised Statutes of Missouri, provides for the formation of county library districts, which districts consist of all the territory of a county outside the limits of cities maintaining a tax supported library.

It follows, therefore, that if Fort Leonard Wood and the other United States military or Air Force bases are part of the counties in which they are physically located, such United States bases are part of the county library districts in which they are physically situated since all of such bases are outside of cities and the persons residing on such military bases are living in such county library districts.

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Persons who live on military bases are residents of the county library district in which the bases are physically situated, and hence, such persons should be counted in determining the population of such county library district for purposes of allocating state aid to such county libraries under provisions of Section 181.060, RSMo, which provides that at least fifty per cent of the moneys appropriated for state aid to libraries "shall be based on an equal per capita rate for the population of each \* \* \* county or regional library district in which any library is or may be established, in proportion to the population according to the latest federal census of such \* \* \* county or regional library districts", and also for the purposes of allocating state aid for establishment and equalization grants of state aid under such section which provides for "establishment grants on a population basis to newly established county or regional libraries and equalization grants on a population basis to county or regional libraries \* \* \*." The 1960 federal census for the counties in which the federal military bases are located includes persons residing on military bases. Therefore for the purpose of determining the population of county library districts under Section 181.060, there should also be included, as part of the county population, persons residing on federal military bases in such counties.

Since persons residing on Federal military bases are residents of county library districts in the counties in which such bases are located, it also follows that such persons are entitled to library service in such county library districts under the provisions of Section 182.120, RSMo, providing that "service shall be available to all residents of the county library district."

Section 12.030, Revised Statutes of Missouri, provides as follows:

"The consent of the state of Missouri is given, in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this state acquired prior to the effective date of sections 12.030 and

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12.040, as sites for customhouses, court-houses, post offices, arsenals, forts and other needful buildings required for military purposes."

Section 12.040, Revised Statutes of Missouri, provides as follows:

"Exclusive jurisdiction in and over any land acquired prior to the effective date of sections 12.030 and 12.040, by the United States, is ceded to the United States for all purposes, saving and reserving, however, to the state of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the state of Missouri the right to serve thereon any civil or criminal process issued under the authority of the state, in any action on account of rights acquired, obligations incurred, or crimes committed in this state, outside the boundaries of the land but the jurisdiction ceded to the United States continues no longer than the United States owns the lands and uses the same for the purposes for which they were acquired."

For many years State and Federal courts in a long line of cases held that persons living on Federal military bases in states which had consented to exclusive Federal jurisdiction over territory obtained by the Federal Government for military bases, could not vote in state elections because such Federal military bases were not part of the state in which they were physically located.

The reasoning in such cases is well set forth in the case of Arledge v. Mabry, 197 P.2d 884, 52 N.M. 303, decided in 1948 in which case the Supreme Court of New Mexico said, 1.c. 891, in quoting from Consolidated Milk Producers v. Parker, 19 Cal.2d 815, 123 P.2d 440:



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"The same declaration occurs in some of the so called 'vote cases' since, indeed, all rest their decisions on the hypothesis that the land on which residence is claimed is outside the state territorially, within contemplation of law, so far as intended by the constitutional requirement of residence as a condition of the right to vote. In the case of *In re Town of Highlands*, supra [22 N.Y.S. 139], the court said:

"We turn to the question of the right of these people to vote. That has been decided in numerous cases. In the case of *Com. v. Clary*, 8 Mass. 72, the supreme court of Massachusetts held that the people on the government property at Springfield had no right to vote, and the question also arose, and was decided, in a case reported in 1 Metc. 583, (Supp.)

\* \* \* So, as Judge Field says, there is a uniform current of authority from the beginning of the government down to the decision of this (Ft. Leavenworth) case in 1884,--all to the effect that this territory is not part of the state.  
(Emphasis ours.) \* \* \*

The doctrine that a resident of a Federal military base is not a resident of the state in which the base is located was upheld also in a recent case by the Court of Appeals of Maryland. Such case is *Royer v. Board of Election Supervisors for Cecil County*, 231 Md. 561, 191 A.2d 446, certiorari denied by the Supreme Court of the United States, November 18, 1963. In that case the Court of Appeals of Maryland held that civilian employees of the United States Government residing on the Perry Point Veterans' Hospital grounds were not entitled to register and vote in Cecil County, Maryland, in which county the Veterans' Hospital was located, because the court held that residents of such Federal areas are not residents of the State of Maryland. It should, however, be noted that in granting the cession of such areas to the Federal Government, the

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State of Maryland did not reserve the right of taxation but reserved only the right to serve civil and criminal process on persons found within the Federal areas.

We do not, however, agree with the reasoning of such cases which hold that the territory in Federal military bases is not a part of the state in which it is located for any purpose, but we believe that the territory occupied by Federal military or naval bases is a part of this state and the counties in which such bases are located for purposes of determining the area comprising a county library district and for purposes of determining the population of such a county library district.

We believe that the correct reasoning is that set forth by the Supreme Court of West Virginia in the case of Adams v. Londeree, 83 SE2d 127, 139 W. Va. 748, and the District Court of Appeals, First District of California in the case of Arapajolu v. McMenamin, 249 P.2d 318, 113 Cal. App.2d 824, 34 A.L.R.2d 1185. In such cases, it was held that persons residing on territory in Federal military or naval bases may be entitled to vote at elections within the states in which the bases are located, because such persons are living in and can establish residence in such states. In the case of Arapajolu v. McMenamin the court said, 249 P.2d 318, 1.c. 322:

"In like fashion the Congress has receded and returned to the States jurisdiction over federal lands within their borders to enforce State unemployment insurance acts therein, 26 U.S.C.A. § 1606(d); to tax motor fuels sold therein, 4 U.S.C.A. § 104; to levy and collect sales and use taxes therein, 4 U.S.C.A. § 105; and to levy and collect State income taxes therein, 4 U.S.C.A. § 106. The power to collect all such taxes depends upon the existence of State jurisdiction over such federal lands and therefore may not be exercised in territory over which the United States has exclusive jurisdiction. Standard Oil Co. v. California, 291 U.S. 242, 52 S.Ct. 381, 78 L.Ed. 775. In recognition of this fact the Congress has made these recessions to the States in terms of jurisdiction, e.g. 4 U.S.C.A. §§ 105 and 106: 'and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State \* \* \*'; 26 U.S.C.A. § 1606(d): 'and any State shall have full jurisdiction and power to enforce the provisions of such law \* \* as though such place were not owned, held, or possessed by the United States.'

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"Of the recession by the Congress to the States of the jurisdiction over federal lands to levy and collect income taxes on incomes earned therein or by residents thereof the Supreme Court of Pennsylvania said in *Kiker v. City of Philadelphia*, 346 P. 624, 31 A.2d 289, at page 295, certiorari denied 320 U.S. 741, 64 S.Ct. 41, 88 L.Ed. 439:

" 'The reservation is immediately adjacent to Philadelphia; is geographically within its limits; and since December 31, 1940, because of the provisions of Public Act No. 819 [4 U.S.C.A. § 14], is actually part of that City for the purposes of imposing the tax here under consideration.' (Emphasis ours.)

"So in speaking of the recession of jurisdiction to collect taxes on motor fuel used or sold on federal lands the Oklahoma Supreme Court in *Sanders v. Oklahoma Tax Commission*, 197 Okl. 285, 169 P.2d 748, certiorari denied 329 U.S. 780, 67 S.Ct. 202, 91 L.Ed. 670, used the following language found on page 751 of 169 P.2d:

" 'It follows that plaintiff, having used the gasoline in an area which in legal contemplation was no different from any other part of the state, became liable for the tax upon its use and the trial court correctly so held.' (Emphasis ours.)

"There seems no necessity to multiply citations. It is clear that the Congress has receded to the States jurisdiction in substantial particulars over federal lands over which the United States previously had exclusive jurisdiction.

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It may no longer be said of those lands that they are, as said by the Ohio court in *Sinks v. Reese*, supra, 'as foreign to Ohio (California) as is the State of Indiana or Kentucky, or the District of Columbia.'

The Court pointed out that many of the cases holding that persons living on a Federal military base did not live in the state in which the base was located and were, therefore, not entitled to vote at elections in such state were decided before the Federal Government receded certain taxing jurisdiction to the states. The Court said, l.c. 323:

"\* \* \* All of the election cases cited above, except *Arledge v. Mabry*, supra, 197 P.2d 884, in which residents on federal lands were held not to be residents of the State so as to qualify them to vote were decided at a time when the United States did have and exercise exclusive jurisdiction over those lands, and while *Arledge v. Mabry* was decided after the recessions of jurisdiction above set out the court in that case did not consider their effect but assumed that the United States still had an exercised exclusive jurisdiction. \* \* \*

"The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution."

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Of course, Section 12.040, supra, itself provides that the State of Missouri reserves the right of taxation to the same extent and in the same manner as if the cession had not been made.

In the case of Adams v. Londeree, 83 SE2d 127, the Court said, 1.c. 138:

"In a number of Acts of Congress, rights of States to exercise jurisdiction in some respects over such reservations have been recognized, thus making it clear, we believe, that the lands within such reservations in some respects remain the territory of the ceding States. Thus, in the 'Buck Act' mentioned above, 4 U.S.C., § 14, the rights of the respective States to assess and collect 'such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area', were recognized. A statute, 40 U.S.C., § 290, 40 U.S.C.A. § 290, authorizes the several States to apply and enforce the workmen's compensation laws 'to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise \* \* \*'. Another statute, 16 U.S.C., § 457, 16 U.S.C.A. § 457, provides that in case of wrongful death 'within a national park or other place subject to the exclusive jurisdiction of the United States \* \* \* such right of action shall exist as though the place were under the jurisdiction of the State \* \* \*'. Another Act, 26 U.S.C., § 1606, authorizes the respective States to enforce their unemployment compensation laws over 'premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States'. As early



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as 1825 the Congress enacted an assimilation crime statute, providing, in effect, that any offense for which any penalty was not provided by Federal law should be subject to the penalty provided by the State. Revised Statutes, Second Edition, § 5391. Thus, the effect of such statutes is to recognize or vest in the respective States certain rights and privileges over such reservations and, especially in view of later Acts of Congress authorizing acceptance by the United States of partial jurisdiction, there certainly no longer exists any basis for the holdings to the effect that the United States must have and exercise complete and exclusive jurisdiction over such reservations. 'In matters not affecting the operation of the national government, there is no sound reason why federal area residents should not have the same rights, immunities, and responsibilities as residents of the surrounding state'. 58 Yale Law Journal 1402, 1406."

The Court further said, 1.c. 140:

"It may be that in the early history of our country, when the areas of such reservations were few and small (see West Virginia statute quoted above limiting areas which could be ceded to twenty-five acres), there was some justifiable reason, or at least no serious injustice, in holding that the Federal Government acquired sole sovereignty over such ceded lands. But can such a result be justified where large and numerous areas are now owned and are being continually acquired by the United States? However that may be, the United States has, we think, long since refused to accept sole sovereignty of such ceded lands and has repeatedly, both through its Courts and by Acts of Congress, recognized and insisted that States have retained sovereignty as

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to such matters as do not interfere or conflict with the use of the areas by the United States for the purpose or purposes for which the same was ceded. By so holding, the necessity of disfranchising a large number of citizens is avoided."

The Supreme Court of the United States in Howard v. Commissioners of the Sinking Fund of the City of Louisville, 344 U.S. 624, 97 L.Ed. 619, 73 S.Ct. 465, held that the territory occupied by a naval ordnance plant is a part of the state in which it is located. The Court said, 344 U.S., l.c. 626:

"The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodations

Honorable Paxton P. Price

and cooperation are their aim. It is friction, not fiction, to which we must give heed."

The Supreme Court of Missouri in the case of Lankford v. Gebhart, 130 Mo. 621, 32 SW 1127, held that a person who was living permanently in a soldiers' home in Kansas could not vote in Missouri because he was a resident of the State of Kansas. The Court said, l.c. 1131:

"The evidence shows that Snyder had lived in Daviess county for many years, but at the date of the election was a member of the soldiers' home at Leavenworth, Kan. It did not appear how long he had been a member of the home. Snyder testified that he was a 'permanent' member of the home, and was admitted free, but testified further that he had no intention of changing his residence from Daviess county, in this state, and that he had been home on furlough for four months preceding the election. \* \* \* The evidence that he was a permanent member of the home, and that he was not permitted to leave it without a license or furlough from the manager, would tend very strongly to prove a change of residence. Under the evidence the court may well have inferred that a permanent residence was adopted in the state of Kansas, and, in the absence of any declaration of law, we must presume that it so found."

In the case of Kokinakis v. Kokinakis, 180 SW2d 243, the Springfield Court of Appeals held that a person residing on the Ft. Leonard Wood Military Base is a resident of Missouri, insofar as the divorce laws of this State are concerned. The Court said, l.c. 244:

"Plaintiff was in the service of the United States. He was not drafted; but enlisted in the State of Michigan, and had been at Fort Leonard Wood for some months. Plaintiff's testimony on the questions of residence was as follows: 'I reside at Fort Leonard Wood, Missouri, Pulaski County.' He and defendant were married in Waynesville, Pulaski County, Missouri, on January 14, 1943, and separated about January 25, 1943. The indignities,

Honorable Paxton P. Price

concerning which plaintiff testified, and which were sufficient for divorce, need not be detailed here. They occurred in Pulaski County, Missouri

\* \* \* \* \*

"There was no question but that the indignities complained of occurred in this state, or that defendant was then a resident of this state. Plaintiff testified that it was his intention to make Missouri his home. Residence is entirely a matter of intention. No matter if plaintiff did belong to the United States Army and was likely to be ordered out of the state at any time, he was undoubtedly a resident of Missouri when he married defendant and filed suit for divorce, and intended to make Missouri his home."

It is to be noted that the Supreme Court of New Mexico which held in the case of Arledge v. Mabry, supra, that persons on a Federal military base are not residents of the state in which the base is located and could not, therefore, vote at elections in such state also held in the case of Chaney v. Chaney, 201 P.2d 782, 53 N.M. 66, that a person residing on such a base is not entitled to a divorce in New Mexico because such person is not a resident of the State of New Mexico.

In Missouri, however, as pointed out in the Kokinakis case, supra, the holding has been made that a person residing on a Federal military base is a resident of this state and is a resident of the county in which such base is located insofar as divorce proceedings are concerned.

#### CONCLUSION

Persons living on Federal military bases located in the State of Missouri are residents of county library districts whose geographical boundaries include such Federal bases and such persons are to be counted in determining the population

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of such county library districts for ascertaining the amount of state aid the county library districts are entitled to receive and such persons are entitled to the services of the libraries established in such districts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

CBB: jh



LIEUTENANT GOVERNOR: Section 26.020, RSMo 1959, does not  
GENERAL ASSEMBLY: prohibit Lieutenant Governor from  
STATUTES: employing two secretaries.

OPINIONS NOS. 186, 187

*copies  
in  
vault*

May 15, 1963

Honorable Hilary A. Bush  
Lieutenant Governor

Honorable Paul M. Berra  
Chairman, House Appropriations  
Committee

Capitol Building  
Jefferson City, Missouri



Gentlemen:

Both of you have written to me concerning the same question and in the interest of simplification I shall quote from Representative Berra's letter as follows:

"In checking the current Blue Book, it has come to my attention that the office of Lieutenant Governor is employing 2 secretaries. There is no doubt in my mind that 2 secretaries are needed, but I am wondering if there is a violation of Section 26.020."

Section 26.020, RSMo 1959, to which you make reference, is as follows:

"Within the limits of appropriations for such purpose, the governor may employ and fix the compensation of such legal and clerical assistants as may be necessary for the efficient conduct of his office. The lieutenant governor may likewise employ and fix the compensation of a secretary."

Before reaching the merits of your question, I believe I should state the obvious, namely to point out that I have filed as a candidate for the office of Lieutenant Governor

Honorable Hilary A. Bush  
Honorable Paul M. Berra

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in next year's election. Thus, your question as to the number of secretaries the Lieutenant Governor may employ is one in which I have a prospectively hopeful personal interest. Were I a judge, this interest would be sufficient to cause me to disqualify myself from passing on the issue. However, our law requires the Attorney General to render official opinions to certain public officials, including members of the General Assembly, and no provision is made for anyone else to issue an opinion in the event the Attorney General disqualifies himself due to an interest in the subject matter. Therefore, I must apply the legally established "rule of necessity" and render the opinion which you have requested. (See *Evans v. Gore*, 253 US 245, where the United States Supreme Court found it necessary to rule on a question involving taxation of the Justices' own salaries.)

Turning, then, to the question which you present, we must determine the intention of the Legislature in authorizing the Lieutenant Governor to appoint "a secretary". If the article "a" is construed to mean "one", then it would appear that the Lieutenant Governor is presently employing personnel in excess of the statutory authorization. If, however, it appears that the term was not used as a numerical limitation, we may say that the Lieutenant Governor is authorized to employ secretarial help as needed, within the limits of his appropriation.

In the often-cited and leading case of *State ex rel. Attorney General v. Martin*, 60 Ark. 343, 30 SW 421, the Supreme Court of Arkansas was faced with a very similar question. The Constitution of the State of Arkansas provided that "The state shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected. . . ." (Emphasis added.)

The Legislature provided for the appointment of an additional judge for one of the circuits due to the great press of judicial business in that circuit. The contention was made that the constitutional language provided for the election of but one judge for each circuit and that the legislative action was therefore unconstitutional. The court ruled to the contrary, stating (l.c. 422):

"Now, the adjective 'a,' commonly called the 'indefinite article,' and so called, too, because it does not define any particular person or thing, is entirely too indefinite, in the connection used, to define or limit the number of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning was well understood by the framers of our constitution, for nowhere in that instrument do we find it used as a numerical limitation."

The court went on to say (l.c. 425):

"But we are of the opinion that this grammatical particle 'a,' whose office is frequently only to preserve euphony in the use of words and structure of sentences, and whose force often depends upon the mere accident of accentuation, was not used, nor was it ever intended to be used, by the framers of our organic law, so as to obstruct and partially defeat the exalted purpose for which the circuit courts, the 'great residuum of all jurisdiction,' were created, namely, the speedy administration of public justice."

An almost identical question was presented to the Supreme Court of Oklahoma more recently in *Dobbs v Board of County Commissioners of Oklahoma County*, 208 Ok. 514, 257 P2d 802. There, too, the Constitution provided for the election of "a County Judge" in each county and the Legislature sought to provide for two such judges in each county having a population of 300,000 or more. The court adopted the reasoning of the Supreme Court of Arkansas in *State v. Martin*, supra, and held that the term "a" was not to be construed as a numerical limitation and that the Legislature was empowered to enlarge upon the number of judges to be elected in each county.

Another case construing the term here in question is *Lindley v. Murphy*, 387 Ill. 506, 56 NE2d 832, 838, where the Supreme Court of Illinois stated:

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Honorable Paul M. Berra

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"The article 'a' is generally not used in a singular sense unless such an intention is clear from the language of the statute, 1 C.J.S., A p. 1; \* \* \*. We agree with plaintiffs that the article 'a' refers not to quantity but, instead, to the quality or nature \* \* \*."

See, also, First Trust Joint Stock Land Bank of Chicago v. Armstrong, 222 Ia. 425, 269 NW 502, and In re Application of Hotel St. George Corp., 207 N.Y.S.2d 529, 531.

Our own courts have also had occasion to consider this problem. In State ex rel. Crown Coach Co. v. Public Service Commission, 238 Mo. App. 287, 179 SW2d 123, the statute provided:

" \* \* \* that the issuance of a certificate of convenience and necessity to one carrier shall not prohibit the granting of such certificate to another carrier over the same route if in the opinion of the commission the public convenience and necessity will be promoted by so doing." (Emphasis added.)

The contention of the appellants was stated by the Court of Appeals as follows (l.c. 127):

"It is argued that when the statute provided for the issuance of 'a' certificate that 'a' meant one, and that the Commission may grant a certificate to 'another' or 'some other' carrier means 'one more, in addition'. From this premise, appellants assert that the Commission is powerless to grant a certificate to more than two carriers over the same route regardless of what the evidence may show with respect to the service rendered the public."

The court ruled against this contention, pointing out that Section 652, R.S. Mo. 1939, provided that:

"'When any subject-matter, party or person is described or referred to by

words importing the singular number  
\* \* \* several matters and persons,  
\* \* \* shall be deemed to be included."

The court held, therefore, that the article "a" need not necessarily denote the singular.

This rule of statutory construction that words denoting the singular also include the plural is still a part of our law. Section 652 of the 1939 Statutes, quoted above, has been carried over to the present statutes as Section 1.030(2), RSMo 1959, with no significant change in its terms.

From the foregoing it can be seen that not only have the courts held that the term "a" is not necessarily a limitation as to number and does not denote "one" in every case, but also that our law provides that the use of a term in a statute which might be thought to import the singular may include the plural.

With these rules in mind, we turn to the section in question, Section 26.020, RSMo 1959, and look to its legislative history for assistance in determining its meaning.

This section was drafted in 1949 as a part of a general revision of the statutes conducted by the 65th General Assembly. In preparing the revision bill from which this section was derived (S.B. 1008, 65th Gen. Ass.), the revisors stated as follows (House and Senate Journals, Vol. III, 65th Gen. Ass. p. 30):

"There appears to be no statutory provisions authorizing the governor or lieutenant governor to employ any clerical, secretarial or other assistants. Prior to 1939 Section 13390 provided a salary for the secretary to the governor and it still provides salaries 'for other clerks in the office of the governor.' Laws 1939, p. 676, reenacted this section without any provision for a salary for the secretary to the governor. It is suggested, in view of this situation, that a section be enacted authorizing the governor and lieutenant governor to employ such assistants as are necessary and authorizing the fixing of their compensation."  
(Emphasis added.)



Honorable Hilary A. Bush  
Honorable Paul M. Berra

Following this comment, the Revision Committee proposed a section in the form now found as Section 26.020. It appears that those drafting the statute intended to authorize both the Governor and Lieutenant Governor to appoint assistants as needed.

Keeping in mind the above-quoted authorities holding that the word "a" does not normally mean "one" in the context of a provision such as Section 26.020, and having gleaned the legislative intent from the comments of the framers of the statute, I am led to the conclusion that this section does not limit the Lieutenant Governor to the appointment of but one secretary and that he may employ secretarial assistants as needed.

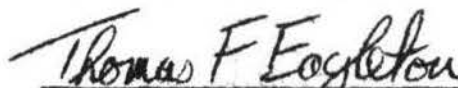
I am supported in this conclusion by what appears to be an identical interpretation placed on Section 26.020 by recent sessions of the General Assembly. In each, the 69th, 70th and 71st General Assemblies, the amount of \$7,200.00 annually in excess of the Lieutenant Governor's salary was appropriated for the payment of salaries in the Lieutenant Governor's office. (L. 1957, p. 97, L. 1958, 2d Ex. Sess., p. 27; L. 1959, H.B. No. 62, §4.140; L. 1961, p. 64.) The Blue Book for each of the periods covered by these appropriations shows that these sums were used for the payment of two secretaries' salaries. Thus, the General Assembly has evidently construed Section 26.020 as authorizing the Lieutenant Governor to employ more than one secretary.

As Representative Berra points out in his letter, there is no doubt that the duties of the Lieutenant Governor necessitate the employment of more than one secretary. This is not to say, however, that there are no limitations placed upon the Lieutenant Governor in the employment of his staff. Section 26.020 authorizes appointments by the Governor and Lieutenant Governor only "within the limits of appropriations for such purpose."

#### CONCLUSION

It therefore is my opinion that there is no statutory prohibition barring the Lieutenant Governor from the employment of more than one secretary, if the money appropriated to him for that purpose is sufficient for the payment of such additional salaries.

Yours very truly,

  
THOMAS F. EAGLETON  
Attorney General

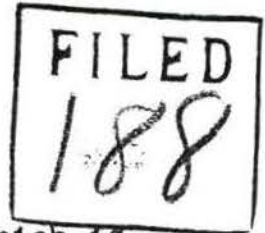
JJM:ML

ASSESSORS (CITY AND TOWNSHIP): 1. The offices of city assessor  
TOWNSHIP ORGANIZATION: and city councilman in a third  
CITY COUNCILMAN: class city are incompatible and  
THIRD CLASS CITIES: one person may not hold both of  
COUNTIES: said offices simultaneously.  
2. The offices of city assessor  
in a third class city and township clerk, ex officio assessor,  
in a township organizational county of the third class are not  
incompatible nor is there any statutory or constitutional pro-  
hibition against one person holding both offices and therefore  
one person may hold both offices simultaneously.

July 24, 1963

OPINION NO. 188

Honorable Ruben A. Schapeler  
Representative  
Bates County  
Butler, Missouri



Dear Mr. Schapeler:

This opinion is in answer to your inquiry which is  
stated as follows:

"I would like to inquire whether it  
is permissible for one person to hold  
the office of Township Clerk and ex  
officio Assessor and also hold the posi-  
tion of City Assessor and member of the  
city council at the same time.

"I would appreciate a written opinion  
from you."

In attempting to answer this inquiry it is assumed  
that we are dealing with a township organizational county  
and a city of the third class which has not adopted one of  
the optional forms of city government.

To answer your inquiry it must first be separated  
into its component parts as follows and taken individually:

1. May one person hold the office of city assessor  
and city councilman simultaneously; and,
2. May one person hold the office of township  
clerk, ex officio assessor and city assessor simultaneously.

In general, it may be said that one person may hold  
several public offices at the same time unless forbidden  
by a specific statute, constitutional prohibition or the  
common law rule against holding two offices simultaneously  
when said offices are incompatible.

We know of no specific statute or constitutional

provision that would prohibit the simultaneous holding of offices of city councilman and assessor of a third class city nor the simultaneous holding of township clerk ex officio assessor and city assessor, and therefore must turn to the common law rule to determine the question.

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent \* \* \*." State v. Bus, Mo., 36 S.W. 636, at 637.

There is no universally applicable rule by which this question may be decided. The determination must be made on an individual case to case basis. State v. Grayston, Mo., 163 S.W.2d 335, at 339. There are, however, certain guides which have been set out and which are helpful in each case. The Supreme Court of the State of Montana set out the following in an early case:

"Offices are 'incompatible' when one has power of removal over the other \* \* \*, when one is in any way subordinate to the other \* \* \*, when one has power of supervision over the other \* \* \*; or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both \* \* \*."

Also, it has been stated that offices are incompatible when:

- (a) One is subordinate to the other;
  - (b) One had the power of appointment or removal over the other; or
  - (c) One audits the accounts of the other.
- C.J.S. Officers, §23, p. 135.

With these standards or guides in mind, what are the duties and powers of a city councilman and the assessor in a third class city? The primary sections that in this question involve us are: 77.310, 77.340, and 77.370, RSMo 1959, which respectively provide as follows:



Section 77.310:

"The mayor shall have power to require, as often as he may deem it necessary, any officer of the city to exhibit his accounts or other papers or records, and to make reports to the council, in writing, touching any subject or matter pertaining to his office."

Section 77.340:

"The mayor may, with the consent of the majority of all the members elected to the city council, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment. Any elective officer may, in like manner, for cause shown, be removed from office by a two-thirds vote of all the members elected to the city council, independently of the mayor's approval, or recommendation. The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. The council may pass ordinances regulating the manner of impeachment and removals."

Section 77.370:

"1. Except as hereinafter provided, the following officers shall be elected by the qualified voters of the city: Mayor, police judge, attorney, assessor, collector, treasurer and, except in cities which adopt the merit system police department, a marshal.

\* \* \* \* \*

"3. Whenever a city contracts for the assessment of property or the collection of taxes by the county or township assessor or collector respectively, as authorized by section 70.220, RSMo, the city council shall by ordinance provide that at the expiration of the term of the then city assessor or collector, as the case may be, the office is abolished and thereafter no election shall be had to fill the office; except that in the event the contract expires and, for any reason, is not renewed, the council may by ordinance provide for the election of such officer at the next and succeeding regular elections for municipal officers. \* \* \*"

It may be seen from the above statutes that the mayor and city council have power of supervision over the assessor, power of removal from office, and power to audit the assessor's books. Since, by these provisions, the mayor and city council do have these powers over the city assessor and since our standards or guides show that when these powers are possessed the offices are incompatible, it would follow that the offices of city councilman and assessor are incompatible and one person may not hold both offices simultaneously.

Turning now to our second question, i.e., may one person hold the office of township clerk, ex officio assessor and city assessor simultaneously, we must now apply the guides as set out supra for determining the common law incompatibility. Looking at the statutes concerning the township clerk, ex officio assessor, we find that Section 65.110, RSMo 1959, provides that such clerk, ex officio assessor shall be elected. Section 65.160, RSMo 1959, provides the method of his assuming office. Section 65.230, RSMo 1959, provides for his compensation as clerk; and Section 65.240, RSMo Cum. Supp. 1961, provides for his compensation as ex officio assessor. We find nothing in either Chapter 77, RSMo 1959, governing cities of the third class, or Chapter 65, RSMo 1959, concerning assessors that would conflict in any way with one person holding both offices simultaneously.

Further, we find at Section 77.370, RSMo 1959, as set out supra, a provision that the county or township ex officio assessor may by contract perform the city assessment work and further, at Section 94.010, RSMo 1959, a provision that a county (township) and city assessor's books shall conform



with each other and also at Section 94.015, RSMo 1959, the procedure to be used when the township assessor by contract performs the assessing for the city.

From the fact that there is no power of supervision, audit, removal and the added factor, as mentioned supra, that the city may by contract provide that the township assessor may provide the city assessment books, it is evident that there is no incompatibility between the offices of city assessor in a third class city and township assessor and therefore one person may hold both offices simultaneously.

#### CONCLUSION

It is the opinion of this office that:

1. The offices of city assessor and city councilman in a third class city are incompatible and one person may not hold both of said offices simultaneously.
2. The offices of city assessor in a third class city and township clerk, ex officio assessor, in a township organizational county of the third class are not incompatible nor is there any statutory or constitutional prohibition against one person holding both offices and therefore one person may hold both offices simultaneously.

This opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Very truly yours

THOMAS F. EAGLETON  
Attorney General

RRN:im

May 23, 1963



Honorable Charles P. Moll  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Mr. Moll:

This is in response to your request of April 26, 1963, relative to the same individual holding the office of county treasurer and county civil defense director in a third class county.

We take the liberty of enclosing herewith a copy of a prior opinion of this office, dated March 5, 1956, to Honorable George Q. Dawes, Prosecuting Attorney of Iron County, which as you can see indicates that unless there is some conflict or incompatibility between the offices they may be held by the same individual.

You do not point out and we do not infer any incompatibility between the offices in question here.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

Enc.

HLM:BJ

OPINION REQUEST NO. 199 ANSWERED BY LETTER

June 12, 1963



Honorable Herman G. Kidd  
Representative, Randolph County  
Missouri Legislature  
Jefferson City, Missouri

Dear Mr. Kidd:

In your request you raise the question of whether the county court of Randolph County has authority to issue an order striking from the assessor's book the current year's taxes or taxes for prior years, under the procedure and authority of Section 137.270, RSMo 1949, where the real estate assessed is owned by a charitable institution and actually and regularly used exclusively for purposes purely charitable and not held for private or corporate profit.

Under the facts stated, it is presumed that the property involved is exempt from taxes under Section 137.100 RSMo 1949 and Art. X, Section 6, Constitution of Missouri, but has been erroneously assessed for taxes. In an opinion dated February 12, 1959, this office held that the charter and by-laws of the Community Memorial Hospital would be consistent with its operation as a tax-exempt charitable institution if, as a matter of fact, the operation of such hospital was such as to entitle it to be considered a charitable institution. We assume that the same institution and charter are involved in the instant request and we are enclosing a copy of that opinion for your convenience.

In an opinion dated January 15, 1944, this office held that the county court has jurisdiction to correct taxes extended against exempt property, but no authority to change taxes extended before the property became exempt. We are enclosing a copy of this opinion since it appears to bear directly on the question involved.

The only remaining question, then, is whether Section 137.270 RSMo 1949 authorizes the county court to correct an

Honorable Herman G. Kidd - 2

assessment under the circumstances herein involved. In other words, do the circumstances herein involved constitute an erroneous assessment under the above cited statute? An opinion issued by this office on August 12, 1946, carefully analyzes the term "erroneous assessment" and indicates that this term has reference to an assessment that deviates from the law. This opinion indicates that the term "erroneous assessment" is sufficiently broad to authorize a correction by the county court where exempt property has been assessed by mistake. We are enclosing a copy of this opinion.

In conclusion, we believe that the three above-mentioned opinions previously issued by this office are in substance correct and that if the hospital is properly tax-exempt under Section 137.100 RSMo 1949, and Article X, Section 6, Constitution of Missouri, then the county court would have jurisdiction to strike from the assessor's book an assessment made as a result of error or mistake.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

CB:df  
encs.

July 29, 1963



Honorable R. B. Mackey  
Commissioner of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Sir:

This letter of advice in lieu of a formal opinion is in answer to your recent inquiry reading as follows:

"In view of Section 375.910, RSMo., 1959, particularly applicable to reciprocal and inter-insurance exchanges, are such insurance writers subject to 'Regulation C' amended September, 1961, adopted by the Commissioner of Finance pursuant to authority found in Missouri's Consumer Credit Loan laws found at Sections 367.100 to 367.200 RSMo 1959?"

"Regulation C" referred to in the above question amended September, 1961, provides:

"Fire, wind and or extended coverage insurance may be sold, requisitioned, required, or accepted by any lender in connection with any consumer credit loan secured by a lien on personal property, other than motor vehicle, in an amount that does not exceed the amount of the loan adjusted up to the next \$100.00. The full coverage annual rate shall not exceed the highest rate for substandard risks approved by the Missouri Division of Insurance subject to a minimum premium of \$10.00. PROVIDED, that on consumer credit loans of \$200.00 or less secured by a lien on household goods, no fire, wind and or extended coverage insurance



may be sold, requisitioned or required by any lender. (Section 367.170, Laws of Missouri, 1951.) (Amended September 1961)."

Senate Bill 78, passed by the Sixty-Sixth General Assembly of Missouri (Laws of Missouri, 1951, p. 262) carried the following title:

"AN ACT" providing for the supervision and regulation of the business of making consumer credit loans, as defined, of money, credit, goods, or things in action, and providing penalties for violation; containing an emergency clause."

The 1951 Act referred to above is now found, unchanged, at Sections 367.100 to 367.200 RSMo 1959. "Regulation C" treated in this opinion stems from authority given to the Commissioner of Finance by Section 367.170 RSMo 1959, which provides:

"The commissioner is authorized and empowered to make such general regulations as may be necessary for the enforcement of sections 367.100 to 367.200 and shall issue regulations providing and governing the types and limits of insurance and the issuance of policies which may be sold in connection with consumer credit loans. The cost of any insurance shall not exceed the standard rates and the insurance shall be obtained from an insurance company duly authorized to conduct business in this state and the registrant, or any of its employees, may be licensed as an insurance agent. Insurance premiums shall not be considered as interest, service charges or fees in connection with any loan. Each such regulation shall be consistent with sections 367.100 to 367.200 and shall be referenced to the specific provisions of sections 367.100 to 367.200 which is to be enforced by it. Nothing in this section shall alter or amend the statutes of this state relating to insurance or affect the powers of the superintendent of insurance under such statutes."

Section 375.910 RSMo 1959, referred to in the question to be answered in this opinion, provides:

"Except as herein provided no law of this state relating to insurance shall apply to the exchange of such indemnity contracts; provided, however, that the provisions of the retaliatory law shall apply."

Section 375.910 RSMo., 1959, quoted above is grouped with Sections 375.790 to 375.920 RSMo., 1959, a portion of Missouri's Insurance Code under which inter-insurance exchanges are organized and exist. The language of Section 375.910 RSMo., 1959 has not changed since its enactment in 1915 (L-1915, p.324).

Special notice is taken of the following language from Section 367.170 RSMo., 1959:

"\* \* \*Nothing in this section shall alter or amend the statutes of this state relating to insurance or affect the powers of the superintendent of insurance under such statutes."

In examining "Regulation C," quoted supra, we fail to find any language in the regulation which would in any way alter or amend the statutes of this state relating to insurance or affect the powers of the superintendent of insurance under such statutes. The regulation is directed solely to consumer credit lenders licensed under Sections 367.100 to 367.200 RSMo., 1959. It was promulgated for the purpose of complying with the mandate found in Section 367.170 RSMo., 1959, directed to the Commissioner of Finance in the following language:

"The commissioner \* \* \*shall issue regulations providing and governing the types and limits of insurance and the issuance of policies which may be sold in connection with consumer credit loans. The cost of insurance shall not exceed the standard rates \* \* \*."

"Regulation C" on its face appears to be a reasonable and proper compliance with the directive contained in Section 367.170 RSMo., 1959. The regulation is not directed to insurance companies but solely to consumer credit lenders. The language of "Regulation C" does not appear in any way to effect an alteration

Honorable R. B. Mackey - 4

or amendment of the statutes of this state relating to insurance or affect the powers of the superintendent of insurance under the insurance code. You are advised that continued enforcement of "Regulation C" as to consumer credit lenders is warranted under the law.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JLO:df

OPINION REQUEST #203 ANSWERED BY LETTER

August 26, 1963



Mr. Paul C. Martin  
Consumer Credit Supervisor  
Division of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Martin:

This letter of advice is in reply to your inquiry concerning the right of consumer credit lenders to charge the contract rate of interest on consumer credit loans after their maturity. The factual situation you presented was outlined in a letter of considerable length you received from a licensee, a copy of which accompanied your inquiry.

It appears that your examiners are making the following contention:

Unless the maturity of the note was accelerated at least one month prior to maturity, in accordance with Section 408.175 RSMo 1959, it cannot bear interest at the rate originally contracted for, computed on the unpaid balance for the time actually outstanding until paid.

A reading of Section 408.175 RSMo 1959 discloses that such statute is addressed solely to notes whose maturity is accelerated, and contains a directive touching pre-computed interest which, if followed, simply guarantees that the borrower will not have to pay interest over a period during which he has not had the use of the original sum borrowed. It is difficult to see how Section 408.175 can be cited as prohibiting interest at the contract rate after maturity.

Since the notes in question are all fully matured and in default, we are not concerned with the question of

acceleration of notes treated in Section 408.175 and General Regulation "D". However, Section 408.175 does disclose the legislative intent touching interest charges on pre-computed interest notes whose maturity has been accelerated when it provides:

" \* \* \* and thereafter the note or loan contract shall bear interest at the rate originally contracted for, computed on unpaid balances for the time actually outstanding from the installment date following the date of acceleration until paid."

With reference to the right to collect interest charges we perceive little or no difference between a note whose maturity has been accelerated and a note which has matured and is in default, and no reason seems apparent why the latter note should not bear interest "until paid" just as a note whose maturity has been accelerated. It is reasonable and proper to apply the legislative intent so evident in Section 408.175.

We can say of our own law as was said of the Ohio Small Loan Act in 1935 in the case of Ohio Loan Company v. Porychuk, et al., 34 N.E. 2d 1021, 1.c. 1022, 1023:

" \* \* \* There is nothing in the statute which in any way controls the maturity date or in any way fixes a different rate of interest before and after maturity. Therefore, we are remitted to the contract between the parties and the only reasonable construction that may be placed upon that contract is that defendants agreed to pay three percent per month on the unpaid balance until the loan is paid.

"It is our understanding that the law is well established that a valid contract entered into by the terms of which the borrower agrees to pay a rate authorized by law the loan carries that rate both before and after maturity. Whatever anyone may think about the sound public policy of this legislation, there is express authority for a charge of three percent per month upon a loan under three hundred dollars."



Mr. Paul C. Martin - 3

The general rule which has been followed in Missouri for many years in relation to interest on a note after maturity is stated in the following language from Macon County v. Rodgers (1884), 84 Mo. 66, l.c. 68:

" \* \* \* It is, however, no longer an open question in this state, this court having held in Broadway Savings Bank v. Forbes, 79 Mo. 226, that a note bearing a certain rate of interest until due, bears the same rate after maturity. To the same effect is Borders v. Barber, 81 Mo. 636."

The factual situation disclosed in the letter accompanying your inquiry brings to our attention a quoted provision appearing in the particular notes held by the licensee providing that "additional interest for delinquency" may be charged. Such quoted provision cannot be reviewed unless a copy of the note is available, and for that reason the remarks made in this letter of advice are not directed to such fact.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JLO:df

June 14, 1963

Honorable Milton Carpenter  
State Treasurer  
State Capitol Building  
Jefferson City, Missouri



Dear Mr. Carpenter:

This refers to your letter of May 1, 1963, in which you requested an opinion concerning the following question:

"Should the inspection fees received by the State of Missouri, authorized by Missouri Statutes 414.020, 414.050, and 414.060, be credited to the General Revenue Fund or to the State Highway Department Fund."

Your request and a similar request received from Mr. M. E. Morris, Director of Revenue, were prompted by a letter dated April 29, 1963, addressed to you by Mr. Robert L. Hyder, Chief Counsel, State Highway Commission, requesting that the inspection fees in question be credited to the State Highway Department Fund. Subsequently, in a letter addressed to us under date of May 21, 1963, Mr. Hyder requested that, if we concluded that the inspection fees should not be credited to the State Highway Department Fund, we then consider the question whether the cost of the inspections may properly be paid from that fund, as is now being done.

Section 414.020, RSMo 1959, provides, in part, as follows:

"1. All kerosene, and all gasoline or any other motor fuel, whether manufactured in this state or not, shall be inspected as provided in this chapter before being offered for sale or used in this state. \* \* \*

"2. For the purposes of this chapter motor fuel shall mean all those products subject to the motor fuel tax law of this state. Any petroleum product designated by name or reference as 'kerosene' shall be classified as kerosene."

Elsewhere in Section 414.020 and other portions of Chapter 414, RSMo 1959, such inspection of petroleum products is made the duty of the state collector of revenue, and various requirements are prescribed, including tests to be used and standards to be met.

Provision for inspection fees, to which your inquiry relates, is contained in Section 414.050, RSMo 1959, which reads, in part, as follows:

"1. The fee for the inspection of kerosene and motor fuel under this chapter shall not exceed one and one-half cents per barrel nor be less than one-half cent per barrel.

\* \* \* \*

"4. On the first day of January, 1944 and on the first day of January thereafter the collector of revenue shall ascertain the total receipts and expenses for the inspection of kerosene and motor fuels during the preceding year, and he shall fix the inspection fee for the ensuing year at such rate per barrel not to exceed one and one-half cents and not less than one-half cent as will approximately yield revenue equal to the expenses of administering the law during the preceding year."

Insofar as it is here pertinent, Section 414.060, RSMo 1959, provides that the collector of revenue "shall remit to the state treasurer once a week all money collected as inspection fees".

Neither Section 414.060 nor any other constitutional or statutory provision specifically designated the fund to which these inspection fees shall be credited in the state treasury; and there can be no doubt that, in the absence of some provision to the contrary, the fees should be credited to general revenue.

Mr. Hyder's request that these fees be credited to the State Highway Department Fund was based upon the view that this is required by Article IV, Section 30(b), Constitution of Missouri, which reads in part as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon \* \* \* motor vehicle fuels,

and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof \* \* \* less the cost (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, and less refunds and that portion of the fuel tax revenue to be allocated to counties and to cities, towns and villages under section 30(a) of Article IV of this Constitution, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:"

Pursuant to the foregoing constitutional provision (and Section 226.200, RSMo 1959, which implements it), the revenue described therein is required to be credited to the State Highway Department Fund. We cannot agree, however, that the inspection fees here under consideration constitute such revenue.

These inspection fees are not "derived from highway users as an incident to their use or right to use the highways". The petroleum products specified by the statute must be inspected and the fees paid thereon without reference to whether they are used to propel motor vehicles upon our highways and, in fact, inspection is required of some products which are not commonly used for that purpose. The fees are not paid directly by highway users or other ultimate users of the inspected products and are not passed on, as such, to the users of the products. There is no provision, as in the case of the motor fuel tax, for refunds if the inspected products are not used on the highways. The absence of any direct connection between the oil inspection statutes and highway use is further emphasized by the fact that, while they have since been substantially amended, such statutes were originally enacted nearly one hundred years ago when the principle concern was the use of petroleum products for illumination.

The inspection fees are not "revenue" or "taxes". Inspection is required for the protection of the public and the fees are charged not to produce revenue but simply to reimburse the state for the cost of the services performed by it. Subject to a stated minimum and maximum, the amount charged is determined upon the basis of the cost of inspections during the preceding year. The fact that the statutory minimum charge per barrel now produces more than is actually being spent does not change the basic character of the oil inspection law and the charges made thereunder.

In *Viquesney v. Kansas City*, 305 Mo. 488, 266 S.W. 700, 1.c. 703, it was contended that a city ordinance imposing a one cent per gallon tax on the sale of gasoline was illegal on the ground, among others, that it was in conflict with the then existing state statute concerning oil inspection fees, which was comparable to the present statute except that no minimum was prescribed. In disposing of this contention, the court stated:

"Appellant cites section 6073, R. S. 1919, as amended by the Laws of 1921, p. 404, § 3, which provides for fees for the inspection of gasoline, etc., and that only in such amounts as are reasonably necessary to cover the expense of such inspection shall be collected. That, of course, is a pure police regulation, and not a revenue measure. It relates solely to inspection and limits the fees for inspection.

"Section 8704 is as follows:

"'Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject.'

"The ordinance under consideration, as the appellant contends all through, is a revenue measure. It has nothing to do with the inspection of gasoline and is not in conflict with section 6073."

In view of the foregoing, it is our opinion that the inspection fees under consideration should be credited to general revenue, rather than to the State Highway Department Fund.

Referring now to Mr. Hyder's question concerning payment of the cost of the inspections, such payment may properly be made from the State Highway Department Fund only if the cost of the inspections falls within one of the six numbered categories of expenditures listed in the first paragraph of Article IV, Section 30(b), Constitution of Missouri, which is quoted earlier in this letter.

The first type of authorized expenditure is the cost of collection of the revenue required to be credited to the State Highway Department Fund. Even if the cost of inspections could be regarded as a cost of collection of the fees charged therefor (which seems anomalous to us), our conclusion that the inspection



fees should not be credited to the State Highway Department Fund takes the cost of the inspections out of this class of expenditure. Another class of authorized expenditure is the cost of administering and enforcing state motor vehicle laws or traffic regulations; but, for reasons indicated above and others, we do not regard the oil inspection statutes as motor vehicle laws, and they obviously are not traffic regulations.

The workmen's compensation and retirement system classes of authorized expenditures, of course, also are inapplicable. This leaves the two categories covering cost of maintaining the Highway Commission and the Highway Department and these would not be applicable to the cost of performance by the Department of Revenue of duties placed upon it by statute, as in the case of oil inspections.

In view of the foregoing, it is not apparent to us that there is any basis for the payment of the cost of the inspections from the State Highway Department Fund.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JCB:oa

cc: M. E. Morris  
Director of Revenue  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Robert L. Hyder  
Chief Counsel  
Missouri State Highway Commission  
Jefferson City, Missouri



May 9, 1963

Honorable William J. Esely  
Prosecuting Attorney  
Harrison County  
P. O. Box 104  
Bethany, Missouri

Dear Mr. Esely:

This will acknowledge your letter of May 6, 1963, requesting the opinion of this office on the question of whether all actual jury costs on a change of venue in a criminal case, where the defendant was convicted, are taxable against the county where the information was filed.

Under date of January 4, 1963, this office answered a somewhat similar request from the Hon. John A. Honssinger, Prosecuting Attorney, Laclede County. A copy of that opinion is enclosed. A copy of the opinion to Hon. Norman H. Anderson, also dated January 4, 1963, which is referred to in the Honssinger opinion, is also enclosed.

The foregoing opinions will answer the question on which your circuit clerk desires an opinion. The county from which the change of venue was taken is not liable for any jury costs other than those which are expressly made taxable as costs.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JN:sr

Enclosures - 2

MAGISTRATE COURTS:  
COUNSEL, APPOINTMENT OF:  
MISDEMEANORS:  
INDIGENTS:

(1)  
Magistrate courts of this state have the power to appoint counsel to represent indigent defendants accused of misdemeanors.

(2)  
Counsel must be appointed in all misdemeanor cases of more than minor significance and in all cases where prejudice might result.

(3)  
No plea of guilty to a misdemeanor charge may be taken in the absence of counsel unless the accused has intelligently waived his right to be represented by counsel

June 21, 1963

OPINION NO. 207

Honorable Robert A. Young  
State Senator  
Twenty-fourth District  
3500 Adie Road  
St. Ann, Missouri



Dear Senator Young:

This is in response to your request for an opinion concerning certain powers and responsibilities of our magistrate courts. Your request is in two parts as follows:

1. "To what extent does a Magistrate have jurisdiction, power or authority to appoint counsel for indigent defendants accused of crimes?"
2. "What procedural safeguards must be observed by Magistrates in accepting pleas or in connection with trials of criminal cases, in order to comply with the requirements of Gideon v. Wainright 83 Sup. Ct. 792?"

Preliminary to approaching these questions some brief discussion of the decision of the Supreme Court of the United States in Gideon vs. Wainright, \_\_\_\_\_ U.S. \_\_\_\_\_, 83 Sup. Ct. 792, 9 L. Ed.2d 799, is necessary. That decision was rendered March 18, 1963, and overruled a previous decision, Betts vs. Brady, 316 U.S. 455, rendered in 1942. The new doctrine, enunciated by the Supreme Court of the United States, is to the effect that indigent defendants in all criminal cases are entitled, as a matter of right, to be represented by appointed counsel in state court trials guaranteed by the Sixth Amendment to the Constitution of the United States now held to bind the states under the Fourteenth Amendment. Previously, in Betts vs. Brady, it was held that the Sixth Amendment did not bind the

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states. Until Gideon, the states were required by United States Supreme Court interpretation to provide indigents with appointed counsel in "serious" cases only. (Uveges vs. Pennsylvania, 335 U.S. 437, 69 Sup. Ct. 184, 93 L. Ed. 127.) The Supreme Court of Missouri has called attention to the anomalous nature of this doctrine on at least two occasions. State vs. Glenn, 317 S.W.2d 403, 407:

" \* \* \* we do not readily see why the requisites of due process should vary according to the severity of the permissible punishment. \* \* \*"

State vs. Warren, 321 S.W.2d 705, 709:

" \* \* \* we see no readily apparent reason why the minimum standard for due process of law should depend upon the permissible punishment. \* \* \*"

Although the crime charged in Gideon's case was a felony, the Supreme Court of the United States did not limit the language employed by it requiring appointment of counsel to application in felony cases only. This, despite the urging of amicus curiae that it do so. Neither did it limit the scope of its decision to the particular court of general jurisdiction involved.

Specifically, the principal opinion in Gideon's case states:

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

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What is there decided is perhaps best expressed in the concurring opinion of Mr. Justice Clark:

"That the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the amendment and from this court's interpretation."

The obvious burden of this opinion is that the states are obligated to provide counsel in the appropriate situation, which brings us to consideration of your first question.

I.

Since territorial days our courts, having jurisdiction of felony cases, were required by law to appoint counsel to serve without pay for indigents in capital cases. In the general statutory revision of 1835 such courts were required to appoint counsel to serve without pay for indigents in all felony cases. That provision has been carried down to this day and is now found in both Section 545.820, RSMo 1959, and Missouri Supreme Court Rule 29.01.

In addition to the statutory provision and court rule there is authority to the effect that our courts have the inherent power to appoint counsel to serve indigents in all cases (civil and criminal). State ex rel. Gentry et al. vs. Becket et al., 174 S.W.2d 181, 184[4,5]. But the underlying authority for this statement is to the effect that this particular power is predicated upon the common-law right of "courts of record" to regulate practice before them.

As stated in Gentry, supra:

"Attorneys are a privileged class; they only are permitted to practice in the courts; and they are officers of the court. The law confers on them rights and privileges, and with them imposes duties and obligations to be reciprocally enjoyed and performed. \* \* \*"

See also Clark vs. Austin, 101 S.W.2d 977, 988[6-9].



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Although the magistrate courts of this state are not vested with jurisdiction to try felony cases, they are endowed with certain of the judicial power of this state by Article V, Section 1, Constitution of Missouri, 1945, and they are made "courts of record" by Section 517.050, RSMo 1959. Hence by virtue of the authority aforesaid they must be and are vested with the authority to appoint counsel to represent indigents in criminal trials.

The Supreme Court of the United States has stated unequivocally in Gideon that a judgment obtained in a criminal case against an indigent defendant who appears without counsel cannot stand in view of the Sixth Amendment to the Constitution of the United States unless the right there guaranteed is shown to be waived intelligently, understandingly and in the light of full knowledge of said right. If our magistrate courts lacked the power to appoint counsel to serve indigent defendants, then clearly they would lack the power to render a valid judgment against an indigent who refused to waive his right to counsel -- this cannot be.

Lest this opinion and the opinion of the Supreme Court of the United States in Gideon's case create consternation with reference to minor offenses (minor traffic cases, minor disturbance of the peace, etc.), we should point out that Gideon has not finally disposed of the entire question.

By Title 18, Section 3401, United States Code, United States Commissioners are vested with authority to try petty offenses. A "petty offense" is described in Title 18, Section 1(3) as one involving a penalty of six months' imprisonment or less or five hundred dollars fine or less, or both. In Title 18, Section 54(b) (4) it is specifically provided that the federal rules of criminal procedure are not to apply to the trial of petty offenses (it is within these rules that the various federal courts are required and empowered to appoint counsel to represent indigent defendants in criminal cases). In Title 18, Section 3402, it is provided that the Supreme Court of the United States promulgate rules for the conduct of the trial of petty offenses before United States Commissioners. That Court has made such rules but has not required or empowered the United States Commissioners to appoint counsel in these cases, and we find no decision of any superior federal court vitiating a judgment of conviction by a United States Commissioner by virtue of his failure to appoint counsel to serve an indigent defendant.

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Therefore, it may very well be that judgments will be permitted to stand in minor cases where the defendant has been unable to obtain counsel and has not been provided one by the court so long as no manifest prejudice has resulted. However, application of this doctrine (if doctrine it may be called) should be approached with extreme caution so as to avoid the slightest suggestion of prejudice or unfair advantage.

## II.

With respect to your second question, Mr. Justice Sutherland of the Supreme Court of the United States provided the answer in 1932 while dealing with the common-law rule respecting the right to counsel in *Powell vs. Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 166. He states:

"Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel."

He then goes on to say:

"As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. 'For upon what face of reason,' he says, 'can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?' One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused

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shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

To this we can only add that no criminal proceeding should be taken in the absence of counsel unless it can be clearly established that the defendant intelligently waives counsel or that in minor cases none of the following will have a prejudicial bearing:

1. The gravity of the offense charged;
2. The nature of the issue, i.e., whether simple or complex;
3. The age of the accused;
4. The mental capacity of the accused;
5. The background and conduct of the accused including amount of education and experience;
6. The accused's knowledge of the law and court procedure including knowledge thereof presumably gained from previous prosecutions;
7. The ability and willingness of the court to protect the accused during the proceedings (see Annotation, 93 L. Ed. 149).

It should be kept in mind that what is stated here does not specifically apply to the conduct of preliminary hearings before magistrates in this state. Although the opinion request does not touch upon the subject we think it advisable to mention that the Supreme Court of the United States has indicated that the guarantee of the right to counsel does not pertain solely to the conduct of the trial but may bear directly upon all of the proceedings against the accused if, at the particular stage of the proceeding under consideration some matter of defense or tactic is deemed waived or some right lost if not properly asserted. Hence the Supreme Court of the

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United States reversed in Hamilton vs. Alabama, \_\_\_\_\_ U.S. \_\_\_\_\_, 7 L. Ed.2d 114, 82 Sup. Ct. \_\_\_\_\_, because an accused without counsel having pleaded not guilty on arraignment without raising the defense of insanity at that time as required by Alabama law was deemed to have waived the defense and could not raise it in subsequent proceedings.

In Walton vs. Arkansas, \_\_\_\_\_ U.S. \_\_\_\_\_, 9 L. Ed.2d 9, 83 Sup. Ct. \_\_\_\_\_, a judgment was vacated and remanded because the accused was not represented by counsel at the time of arraignment in the course of which he acknowledged the voluntariness of his confession and such acknowledgment was later used in evidence against him at the trial, the court stating:

" \* \* \* We are unable to conclude from the record filed in this court either that petitioner had counsel at the time of the arraignment proceedings or, if not, that he was advised of his right to have counsel at such proceedings and that he understandingly and intelligently waived that right."

In White vs. Maryland, \_\_\_\_\_ U.S. \_\_\_\_\_, 10 L. Ed2d 193, 83 Sup. Ct. \_\_\_\_\_, a state conviction was reversed upon the following facts: Accused was brought before a magistrate for preliminary hearing upon a capital offense without counsel where he pleaded guilty. In due course he was arraigned in a court of general jurisdiction where he was represented by appointed counsel and made pleas of not guilty and not guilty by reason of insanity. At the trial the plea of guilty made by him before the magistrate was introduced into evidence and was not objected to. Nevertheless, as against the contention of the State of Maryland that " \* \* \* Under Maryland law there was 'no requirement (nor any practical possibility under their present criminal procedure) to appoint counsel' for petitioner at the 'preliminary hearing \* \* \* nor was it necessary for appellant to enter a plea at that time.' \* \* \*", the Supreme Court of the United States said: "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel."

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This should stand as an admonition to our prosecuting attorneys as well as to our magistrate judges to avoid the occurrence of any situation at preliminary hearings which, because of the absence of defense counsel, would create inhibiting factors to further prosecution of the case.

#### CONCLUSION

1. The magistrate courts of this state have the power to appoint counsel to represent indigent defendants accused of misdemeanors.

2. In every criminal case coming before a magistrate judge the accused should be advised of his right to appear by counsel. If the accused is indigent, counsel should be appointed to represent him where the case is of more than minor significance and when prejudice might otherwise result. If the indigent accused desires to plead guilty or otherwise proceed without counsel, it should first be shown that he has been advised of his right to have counsel appointed to represent him, how and why counsel could be of benefit to him and that he has the capacity to waive his rights intelligently.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

HLMcF: BJ;ml



June 19, 1963



State Tax Commission of Missouri  
Jefferson Building  
Jefferson City, Missouri

Gentlemen:

You have requested the opinion of this office  
as follows:

"In view of the Missouri Supreme Court decision of April 8, 1963 in the case of American Air Lines, Inc. and Delta Air Lines, Inc. vs. City of St. Louis, et al, this Commission requests an official opinion from your Department on whether or not an apportionment of valuation should be made by this Commission under Section 155.050 RSMo. 1959 to any municipality in this State which owns and operates an airport outside its corporate limits."

The decision to which you refer was an action by two airline companies seeking, together with other relief, a declaratory judgment respecting the validity of the following proviso which is "appended to and is a part of Section 155.050," RSMo 1959:

"provided that, when any municipality in this state owns and operates an airport outside its corporate limits, the valuation determined hereunder shall also be apportioned to said municipality."

In that case, our Supreme Court held that a municipality (the City of St. Louis) could not impose municipal taxes on the aircraft of the airline companies which had no tax

situs in the City of St. Louis but which had arrivals and departures at a municipally owned and operated airport located outside its corporate limits. The decision was premised on the finding that such municipality afforded no governmental benefits or protection to such airlines or their aircraft, and for such reason the city could not validly impose municipal taxes on the aircraft. In the case referred to, the Court reached the conclusion "that the proviso, and City's levies pursuant to the proviso, are invalid and void as violative of due process clauses of state and federal constitution."

In our opinion, the effect of the decision in the above case holding the proviso invalid is not limited to the two airline companies involved in that suit nor to the tax years there in question. The above quoted proviso is invalid and void, and for such reason the State Tax Commission, in making its apportionment under Section 155.050, RSMo 1959, should not apportion to a municipality which owns and operates an airport outside its corporate limits any part of the valuation of the aircraft which are operated at said airport.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

JN:gm

OPINION REQUEST NO. 209  
Answered by Letter (Baumann)

May 15, 1963



Mr. Lue C. Lozier, Secretary  
New York World's Fair Commission  
Jefferson City, Missouri

Dear Mr. Lozier:

This refers to your letter of May 9, 1963, requesting an opinion whether the New York World's Fair Commission, created by House Bill No. 87, 72nd General Assembly, is required to comply with Sections 8.260 and 8.310, RSMo 1959.

The New York World's Fair Commission consists of the governor, president pro tem of the senate, the speaker of the house of representatives, five other senators, five other representatives, and five other persons appointed by the governor. The Commission is directed by House Bill No. 87 to "proceed as speedily as practicable to arrange for the active participation by the state of Missouri in the New York World's Fair of 1964."

House Bill No. 87 further provides that, to accomplish its stated purpose, the Commission shall have the following powers and duties:

(1) To select an appropriate site and to make all arrangements, by lease or otherwise, for a suitable state exhibit on the lands on which the fair is to be held;

(2) To let all contracts required, in its discretion, for the construction and maintenance of the state's exhibits;

(3) To acquire by gift, loan, purchase or otherwise, items for inclusion in the state's exhibits;

(4) To accept gifts of money and personal property for the construction, maintenance, collection and transportation of the state's exhibits;

Mr. Lue C. Lozier

(5) To make proper disposition of the state's exhibits at the close of the fair as it deems advisable; and

(6) To perform any other acts necessary to insure suitable participation by the state in the fair and to carry into effect the purpose of this act.

By Section 27 in House Bill No. 16, 72nd General Assembly, there was appropriated to the Commission for the fiscal period ending June 30, 1963, the sum of \$500,000 "for the use of the Commission". It is contemplated that this sum will be reappropriated for the next fiscal period by House Bill No. 14, which is pending in the General Assembly. In the performance of its statutory function, the Commission has entered into a contract for the construction of a Missouri exposition pavilion at the site of the New York World's Fair. Your letter results from questions which have been raised concerning inconsistencies between that contract and certain provisions of Sections 8,260 and 8,310, RSMo 1959.

Section 8,260 deals with the manner of disbursement of appropriations made for the erection of new buildings on state account (and for repair buildings already erected). It provides for periodic payments to the extent of 85% of the value of labor and materials which have then been furnished; and the contract executed by the Commission differs therefrom principally in that the contract provides for 90% payment. Section 8,310 provides that contracts shall not be let for the construction of buildings without approval of the chief of planning and construction, and that no claim for construction projects under contract shall be accepted for payment without approval by the chief of planning and construction. The contract executed by the Commission apparently has not been so approved and it contains no provision for such approval prior to payments thereunder (payments are to be made upon approval by the Commission's architects).

We seriously question whether a temporary exposition pavilion at a world's fair site in a distant state, such as is being constructed by the Commission, is a building of the kind to which Sections 8,260 and 8,310 were intended, or should be construed, to apply; but we do not consider it necessary definitely to resolve that issue.

Mr. Lue C. Lozier

It is a familiar rule of statutory construction that where two laws relate to the same subject they must be read and construed together and provisions of one having special application to a particular subject are to be deemed a qualification of or an exemption to another act general in terms. *Veal v. City of St. Louis*, 365 Mo. 836, 289 SW 2d 7.

Sections 8.260 and 8.310 are general in nature, whereas House Bill No. 87 is special and has application specifically to construction of Missouri's exhibit at the New York World's Fair. With respect to the one matter with which it is concerned, House Bill No. 87 is a complete and comprehensive piece of legislation and the broad powers granted to the Commission, including particularly the power "to let all contracts required, in its discretion, for the construction \* \* \* of the state's exhibit," are inconsistent with, and should be treated as an exception to, the provisions of Sections 8.260 and 8.310 (assuming the latter would otherwise be applicable to such a building). Accordingly, it is our view that the Commission is not required to comply with Sections 8.260 and 8.310.

The copies of the contract executed by the Commission and Mr. Trigg's letter of April 30, 1963, to Mr. Beisman, which were enclosed with your letter, are returned herewith.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JCB:MM

enc

cc: Charles D. Trigg



CITIES, TOWNS, VILLAGES:  
SPECIAL CHARTER CITIES:  
CONSTITUTIONAL LAW:  
GENERAL ASSEMBLY:  
LEGISLATURE:  
CITY CHARTERS:  
AMENDMENT OF CITY CHARTERS:

Legislature may have authority to provide  
for amendment of charter of special charter  
city by vote.

May 14, 1963



Honorable Patrick J. O'Connor  
Missouri House of Representatives  
Room 301, Capitol Building  
Jefferson City, Missouri

Dear Representative O'Connor:

You have asked the following question:

"May the State Legislature by the proper  
enactment vest in the City of Florissant  
the power to amend or supplement its present  
charter by an affirmative vote of the  
electorate voting on such propositions."

The City of Florissant, like a few other cities in this  
state, operates under a special charter first authorized by the  
Missouri Legislature in 1857.

Your question is whether the legislature can vest in the  
City of Florissant, the power to amend its present special charter by  
a vote of the people.

Obviously, this could not be done by a special law, since  
Article III, Section 40 (22) of the Missouri Constitution prohibits  
special laws amending the charter of a city.

The question then is whether a general law applicable to  
special charter cities (or special charter cities of a certain range  
in population) could authorize the amendment of such special charters  
by a vote of the people.

May 14, 1963

Article VI, Section 16 of the Constitution provides for the classification by the legislature of cities into four classes and that general laws shall define the powers of such classes. However, in *Rutherford v. Hamilton*, 97 Mo. 543, the Missouri Supreme Court held that such special charters may be amended by general laws enacted by the legislature and such section of the constitution does not specifically refer to laws setting forth powers of special charter cities.

The question is then whether a general law applicable to special charter cities or certain special charter cities in a class which general law authorizes the amendment of such special charters by an election of the voters of such a city would constitute an unconstitutional delegation of legislative powers.

In the case of *Yazoo City v. Lightcap*, 82 Miss. 148, the Supreme Court of Mississippi held valid a statute providing that city charters could be amended by the preparation of an amendment to the charter by the mayor and city council and publication of such amendment in a newspaper of general circulation, after which the amendment was to be submitted to the Governor, who submitted it to the state attorney general and, if the attorney general was of the opinion that the amendment was consistent with the constitution and laws of the United States and Mississippi, the Governor should approve the amendment.

If, after publication, one-tenth of the voters of such city protested against an amendment, the Governor could not approve the amendment until such amendment was approved by a majority of the voters of the municipality.

Such statute was attacked on the ground that it was an unconstitutional delegation of legislative power in violation of a provision of the Mississippi Constitution providing that the legislature should pass general laws under which cities and towns might be chartered and their charters amended.

The Supreme Court of Mississippi held that there was no unconstitutional delegation of legislative power by the legislature in authorizing cities to amend their charters by such a procedure.

May 14, 1963

In the case of Reeves v. Anderson, 42 P. 625, the Supreme Court of Washington held valid a statute authorizing freeholders to prepare a new charter for a city when a petition of one-fourth of the freeholders of such city was filed asking for the appointment of the freeholders. The court said, l. c. 626:

"In support of the contention that the act in question is a delegation of a legislative power, we are cited to article 2, section 1, of the constitution, which is: 'Section 1. The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington.' Independent of the constitutional provision now under consideration, an examination of the authorities upon the subject leaves little room for doubting the authority of a given class the powers to make laws for their local self-government, subject at all times, however, to the general laws of the state. \*\*\*"

Under these two cases and others of the same tenor, there is some authority for holding that the delegation by a law enacted by the legislature of the power to cities to amend their charters is not an unconstitutional delegation of legislative power.

However, there still remains some doubt as to whether the Missouri Supreme Court would permit such a delegation of power.

Article VI, Sections 19 and 20 of the Missouri Constitution provide for charters to be framed and amended by the inhabitants of cities over 10,000. It may well be that such constitutional delegation is the only authority in Missouri for the amendment of charters by a vote of the people of a city.

In the case of State v. Orange, 36 Atl. 706, the Supreme Court of New Jersey held an act unconstitutional which authorized a city council to consolidate offices and fix the duties of such consolidated offices as having violated the provision of the state constitution that the legislative power should reside in the Senate and House of Representatives of the state.

In the case of Elliott v. Detroit, 84 N.W. 820, the Supreme Court of Michigan held that an act which provided for amending a city charter when a resolution of the council and mayor was passed or when 5,000 inhabitants asked for an election and the amendments were adopted by a vote of the people was an unconstitutional delegation of legislative power to the people of the city, which power could be exercised only by the legislature under a constitutional provision that the legislature may confer upon cities such power of a local legislative and administrative power as they deem proper.

May 14, 1963

In the case of State ex rel. V. Thompson, 137 N.W. 20, the Supreme Court of Wisconsin held invalid a statute which provided:

"'Every city, in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the Constitution or laws, operative generally throughout the state.'"

Such court held that the act was unconstitutional because it delegated legislative power contrary to the constitution of such state. The court said, l.c. 23:

"In view of the foregoing, very little need be said in testing the act in question by constitutional restrictions. As we have seen, determination of the form of government and everything appertaining to the fundamentals of a city charter are essentially legislative functions. Power in that respect was so universally regarded before the Constitution and thereby the Legislature was disabled from delegating it. Can one read the act under consideration and doubt that, in terms and effect, it involves an attempt at legislative abdication of that power, to a large extent? \*\*\*"

The Constitution of Missouri provides in Article III, Section 1, that the legislative power shall be exercised by the Senate and House of Representatives.

#### CONCLUSION

The question whether by general law the Missouri Legislature can vest special charter cities with the authority to amend their charters by a vote of the people has never been decided in this state. Cases in other jurisdictions have decided this question both ways.

Honorable Patrick J. O'Connor - 5.

May 14, 1963

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General



SALES TAX:  
MOTOR VEHICLE USE TAX:  
MOTOR VEHICLES:  
TRAILERS:  
HOUSE TRAILERS:  
MOBILE HOMES:

Sales of mobile homes at retail are sales tax transactions and the seller or mobile home dealer is required to collect and remit the sales tax to the Director of Revenue. If a purchaser wishes to use his trailer on the highways of Missouri, he must register the trailer and obtain a certificate of ownership. When he applies for his title, the purchaser is required to show satisfactory proof of sales tax having been previously paid.

OPINION NO. 211

September 5, 1963



Col. Hugh H. Waggoner  
Superintendent  
Missouri State Highway Patrol  
Jefferson City, Missouri

Dear Col. Waggoner:

This is in answer to your letter dated May 9, 1963, in which you request an official opinion from this office. In your letter you mention that a number of people are purchasing house trailers throughout Missouri with no intention of using them on our highways. These purchasers are hiring commercial movers to move the newly acquired trailers to a plot of land where they will remain for an indefinite period of time. The movers are operating under "trip delivery permits" issued by the Public Service Commission. As a consequence of all this, you state that many mobile home purchasers are not securing from the Department of Revenue certificates of ownership nor certificates of registration for the trailers. Based upon these facts, you ask the following questions:

- "a. Is a mobile home considered a trailer within the meaning of the trailer definition in subparagraph twenty-seven, Section 301.010, and required to have a trailer license and certificate of title?
- b. Should an individual or a company engaged solely in the sale of mobile homes obtain a dealer's license from the Director of Revenue?
- c. In the event a mobile home is not considered a trailer and a certificate of title is not required, should the purchaser of such a mobile home pay the use tax as provided for in Section 144.440, or should the seller collect a sales tax as in the case of the sale of other merchandise?"

Section 301.010(27), RSMo 1959, defines the word trailer as follows:

"Any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

This same section, at subsection (28), defines vehicle to mean:

"Any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."

It is the opinion of this office that a mobile home or house trailer, as commonly and ordinarily understood, falls within the statutory definitions quoted above.

60 C.J.S., Motor Vehicles, Section 8, Page 118, defines trailers as being:

"\*\*\* A separate vehicle, which is not driven or propelled by its own power, but it is drawn by some independent power; a vehicle without motor power, designed to carry property or passengers wholly upon its own structure, and to be drawn by a motor vehicle \*\*\*."

This definition was cited in the case of Haden v. Lee Mobile Homes, 136 So2d, 912,916. It was held in that case that the trailer definition included house trailers.

A mobile home was described as a vehicle with windows, containing home furnishings, and with electrical and water connections available on its exterior, in Jones v. Beiber, 251, Iowa 969, 103 NW2d, 364,366. It was held there that even though the mobile home had been placed upon a tract of land, its wheels removed, and it was supported by concrete blocks, it did not lose its identity as a "trailer."

Whether mobile homes or house trailers should be registered with the Department of Revenue, license plates issued, and the annual registration fee paid, depends entirely upon the use of the trailers. Section 301.020, RSMo 1959, provides that the owners of trailers "which shall be operated or driven upon the highways of this state," shall file an application for registration. When the Director of Revenue registers a trailer, he then issues license plates to the owner, Section 301.130, RSMo 1959. Sub-paragraph 5 of this section requires the owner to attach these plates to the trailer in a specified manner before the trailer is to be operated on the highways in Missouri.

The annual registration fee has been held to be a tax upon the privilege of operating motor vehicles on the highways of this state. Transport Rentals Inc. v. Carpenter, Mo.Supp. 325 SW2d, 745,749. We believe this privilege tax theory applies equally to trailers or mobile homes.

If a person buys a mobile home and is able to have it transported by a commercial mover, operating under a delivery permit granted by the Public Service Commission, from the dealer to a place where it will not be used on the highways, then the purchaser is under no obligation to register the trailer and pay the annual registration fee.

What we have said with regard to the registration of trailers is equally applicable to the question concerning the acquisition of certificates of ownership or titles to trailers. There is a statutory prohibition forbidding the operation of registered trailers in this state unless the owner has been issued a certificate of ownership, Section 301.190, Paragraph 4, RSMo 1959. It is also unlawful to buy or sell a trailer registered under the laws of this state unless a certificate of ownership passes between the parties at the time of delivery of the trailer, Section 301.210, Paragraph 4, RSMo 1959.

If a person buys a house trailer with no intention of using it upon the highways of this state, then, as mentioned above, there is no requirement to register the trailer. If a mobile home is not registered and is not, in fact, used on the highways, then there is no requirement that the owner obtain a certificate of ownership.

The acquisition of a mobile home at retail is the purchase of tangible personal property, subject to the Missouri Sales

Tax Law, Section 144.020, RSMo 1959. The purchaser is required to pay the tax, Section 144.060, RSMo 1959, and the seller or mobile home dealer is required to collect the tax and remit it to the Director of Revenue, Section 140.080, RSMo 1959. Both of the last cited sections exempt "motor vehicles" from their coverage. The payment of sales tax on the purchase of a motor vehicle is made when a title is applied for, Section 144.070, RSMo, Cum. Supp. 1961.

This entire area has become somewhat confused since the legislature recently amended Section 144.070, RSMo 1959, by having it apply to trailers as well as to automobiles. Laws 1961, Page 627, Section 1. The legislature did not, however, amend Sections 144.060 and 144.080, both supra, so as to exclude trailers from the purview of these provisions.

Therefore, mobile home dealers should collect sales tax upon the sale of all house trailers. If a person wishes to use his trailer on the highways of Missouri, then when he applies for his certificate of ownership, he will be required to show some satisfactory evidence of sales tax having been previously paid. This office has been informed by the Department of Revenue that tax receipt forms have been mailed to all mobile home dealers to cover this situation.

Section 144.440, RSMo, Cum. Supp. 1961, commonly known as the Motor Vehicle Use Tax Law, has also been recently amended to include trailers within its coverage, Laws 1961, Page 627, Section 1. There is no conflict between this section and those sales tax provisions previously mentioned above because Section 144.450, RSMo, Cum. Supp. 1961, states that trailers are exempt from the imposition of Section 144.440, supra, if sales tax has been paid upon the purchase of the trailer.

In light of what has been said about a retail mobile home sale being a sales tax transaction and a mobile home dealer being required to collect and remit sales tax, it naturally follows that these dealers must register with the Director of Revenue and file quarterly returns. We assume your second question asks whether these dealers are required to obtain retail sales licenses as set forth in Section 144.083, RSMo, Cum. Supp. 1961. The answer to this question is yes.

CONCLUSION

Sales of mobile homes at retail are sales tax transactions and the seller or mobile home dealer is required to collect and remit the sales tax to the Director of Revenue. If a purchaser wishes to use his trailer on the highways of Missouri, he must register the trailer and obtain a certificate of ownership. When he applies for his title, the purchaser is required to show satisfactory proof of sales tax having been previously paid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

EGB:bj



CITIES: Article VI, Sec. 16, Constitution of Missouri,  
COUNTIES: authorizes enactment of a law permitting one  
MUNICIPALITIES: municipality to contract with another to fur-  
POLITICAL SUBDIVISIONS: nish police services; but does not authorize  
CO-OPERATION BETWEEN enactment of a law permitting a contract for  
POLITICAL SUBDIVISIONS: municipal judicial service.

May 15, 1963

OPINION REQUEST NO. 213

Honorable E. J. Cantrell  
State Representative  
St. Louis County, 6th District  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Cantrell:

You have inquired as to whether or not two cities may contract with one another to furnish police service and/or municipal judges' services.

We have considered this problem, particularly in connection with Article VI, Section 16, Constitution of Missouri, which appears to have application, as well as Article VI, Section 14, applying to counties, insofar as it may shed light on the meaning of Section 16.

Article VI, Section 16, provides as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

It is apparent that this section of the Constitution authorizes the Legislature to pass laws relating to the co-operation between municipalities or other political subdivisions respecting the "planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service." It would

appear, therefore, that your inquiry relates to this last phrase concerning a common service. The construction of the meaning of the words "common service" does present difficulty. We believe it should be given a rather broad meaning. This is necessary to accomplish the purposes and economies in local government that the writers of the Constitution envisioned. We believe that the courts would be inclined to give it a meaning which would permit municipalities or other political subdivisions to contract with one another to perform almost any administrative service which they each have a duty at one time or another to perform. Therefore, it would seem that services like assessment and collection of taxes, street maintenance and repair, fire prevention and fire fighting, and police service, are the character of services included within the meaning of this language on the theory that each of these services would be common services required to be performed by each municipality and would therefore fall within the meaning of the language "common service" of the Constitution, referred to above.

We have, however, greater difficulty with the problem of a contract between two municipalities whereby one would furnish the service of municipal judges to another. It seems to us that there would be a risk, at least, that this provision might be deemed to be in conflict with Article II, Section 1 of the Constitution, which is the so-called separation of powers provision. Even more fundamental and elementary than the separation of powers provision of the Constitution is a foundation principle of government that executive, legislative and judicial powers which relate to the exercise of sovereignty are generally considered nondelegable duties. It would seem unlikely that the draftsmen of the Constitution intended to authorize one political subdivision to delegate to another the authority to exercise its strictly sovereign functions. For example, one county court could not by contract authorize the county court of another county or city council of a municipality to perform its strictly executive or legislative functions. For this reason, we think it questionable whether the constitutional provision relating to co-operation between political subdivisions would be construed broadly enough to include authority for one city

to delegate by contract to another city the power and authority to judge the violation of the other city's ordinances.

CONCLUSION

Article VI, Section 16, Constitution of Missouri, authorizes the enactment of a law permitting one municipality to contract with another to furnish police services; but does not authorize the enactment of a law permitting a contract for municipal judicial service.

The foregoing opinion, which I approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

GJS:ml

August 21, 1963



Honorable R. B. Mackey  
Commissioner, Division of Finance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Mackey:

This letter of advice is in lieu of a formal opinion in answer to your inquiry of May 16, 1963, concerning voluntary liquidation of a credit union under The General and Business Corporation Law of Missouri.

Your attention is directed to the attached opinion of this office dated May 15, 1953, directed to your office, and holding that a solvent credit union, subject to the provisions of Chapter 370 RSMo 1949, but which cannot effect liquidation and dissolution under the provisions of that chapter, may do so under the provisions of Chapter 351 RSMo 1949.

No change has been found in the statutes cited in the opinion referred to above. We know of no reason why the conclusion of such opinion should not be applied to an insolvent credit union, as well as a solvent credit union. The directive contained in Section 370.150 RSMo 1959 directing you as Commissioner of Finance to take possession of a credit union when it is "insolvent" is no bar to voluntary liquidation under The General and Business Corporation Law of Missouri.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JLO:df  
enc.



OPINION REQUEST NO. 219  
ANSWERED BY LETTER

May 24, 1963

Honorable Granvil B. Vaughan  
State Representative  
Howell County  
State Capitol  
Jefferson City, Missouri

Dear Mr. Vaughan:

This refers to your letter of May 21, 1963, requesting an opinion in regard to the constitutionality of House Bill No. 334, which was introduced by you and which you have previously discussed with us.

House Bill No. 334 would make it unlawful for a third or fourth class county to own for a period of more than two years any real estate in any other county which it does not adjoin and would provide for the sale of such real estate by the sheriff of the county in which it is located if it is held more than two years.

From our study of this bill, we know of no reason why the bill would be unconstitutional. Since the objections of those who have questioned the constitutionality of the bill are not clear to us, there is little purpose in our undertaking a detailed discussion of this matter. However, if the objections are based upon constitutional provisions relating to depriving a person of his property without due process of law, to the taking of private property for public use without just compensation, or to the taking of private property for private use, with or without compensation (Article I, Sections 10, 26, and 28, Constitution of Missouri), our answer is that these provisions have no application in this instance because the bill relates to property owned by counties.



Honorable Granvil B. Vaughan

-2-

As we have mentioned in prior discussions, a sale of real estate pursuant to this bill could not affect rights acquired by private persons in such real estate by lease or contract executed prior to the enactment of the bill and the sale would be subject to such rights; but this does not have any bearing on the constitutionality of the bill.

We also again call attention to the fact that the word "first" in line 6 of the bill apparently should be changed to "last".

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JCB:oa

December 3, 1963



Honorable J. R. Eiser  
Prosecuting Attorney  
Holt County  
Oregon, Missouri

Dear Mr. Eiser:

In answer to your inquiry of May 20, 1963, as supplemented by your letter of October 16, 1963, we enclose a copy of a letter of September 19, 1963, directed by this office to Honorable Orville C. Winchell, Prosecuting Attorney of Laclede County, Missouri. In applying the conclusion found in such letter, it must therefore be reasoned that the general road district tax levied by the County Court of Holt County, as authorized by Section 137.565, RSMo 1959, after voter authorization in April, 1963, must be considered to be included, as a matter of law, to be in Class 3 of the 1963 county budget.

You are further advised that the tax voted in April, 1963, being anticipated county revenue, may be the subject of tax anticipation notes at the discretion of the County Court.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JLO'M: jh  
Enc.

STATUTE OF LIMITATIONS:  
MISDEMEANOR:  
CRIMINAL LAW:  
INDICTMENTS:  
INFORMATIONS:  
WARRANTS:

1. Under Section 541.210 an information or indictment in a misdemeanor must be filed within one year after the commission of the offense but service of the warrant on the defendant within one year is not required. 2. Under Section 541.220, RSMo 1959, the one year statute of limitations imposed by Section 541.210, RSMo 1959, is tolled during the period that the defendant has left the state or concealed himself within the state in order to avoid prosecution.

June 20, 1963

Honorable Don E. Burrell  
Prosecuting Attorney  
County of Greene  
Springfield, Missouri

OPINION NO. 226



Dear Mr. Burrell:

This is in reply to your opinion request of May 21, 1963, in which you state:

"In our county we have a number of misdemeanor cases pending in which the information has been filed immediately after an offense. The problem arises, however, in the fact that our sheriff's office has attempted to locate the defendant and has been unable to serve a warrant within one year after the date of the offense. Our question arises under Section 541.210 RSMo and is as follows:

In order to toll the running of the Statute of Limitations is it necessary that a warrant be served on a defendant within one year from the date of the offense to fall within the scope of, 'Prosecution be Instituted,' requirement of Section 541.210 RSMo?"

Section 541.210, RSMo 1959, requires that a misdemeanor charge must be instituted either by indictment or information within one year after its commission. The language of Section 541.210 is as follows:

Honorable Don E. Burrell

"No person shall be prosecuted, tried or punished for any offense, other than felony, or for any fine or forfeiture, unless the indictment be found or prosecution be instituted within one year after the commission of the offense, or incurring the fine or forfeiture."

The meaning of the phrase "prosecution be instituted" was explained in State v. Criddle, 302 Mo. 634, 259 S.W. 429. In this case appellant had been convicted of the misdemeanor of driving an automobile while intoxicated on October 30, 1921. An affidavit had been filed against the defendant on this charge within one year after the act had been committed. However, the information was not filed until March 12, 1923, or more than one year after the commission of the act.

The Missouri Supreme Court reversed the conviction and discharged appellant, and stated at page 430:

"The institution of a criminal prosecution dates from the filing of the information, and not from the date the affidavit was filed in the justice of the peace court. \* \* \* Prosecution of appellant for the misdemeanor \* \* \* was therefore barred by the statute of limitations when the information was filed." (Emphasis ours.)

The phrase "prosecution be instituted" in Section 541.210, RSMo 1959, must mean the date a misdemeanor information is filed against a defendant.

Another statute worthy of attention under the facts stated in your inquiry is Section 541.220, RSMo 1959, which states:

"Nothing contained in sections 541.200 and 541.210 shall avail any person who shall flee from justice; and in all cases, the time during which any defendant shall not have been an inhabitant of or usually resident within this state shall not constitute any part of the limitation prescribed in said sections."

Honorable Don E. Burrell

By virtue of this statute, the one year period of limitations on the filing of a misdemeanor indictment or information is tolled during the period of time the defendant:

- (1) Remains outside of the State of Missouri; State v. Ford, 286 Mo. 624, 228 S.W. 480, 481 [1]; or
- (2) Remains away from his usual place of abode within the State of Missouri for the purpose of avoiding arrest or prosecution; State v. Washburn, 48 Mo. 240; or
- (3) Remains upon his own premises within the State of Missouri, but conceals himself thereon to avoid arrest or prosecution; State v. Miller, 188 Mo. 370, 86 S.W. 484.

In State v. Harvell, 89 Mo. 588, 1 S.W. 837, our Supreme Court construed the language of Section 1706, RSMo 1879 (identical to Section 541.220, RSMo 1959), to apply to the above instances by stating:

"It was not essential that he should have left the state before he could be regarded as a fugitive from justice. One who commits an offense, and conceals himself to avoid arrest, is a fugitive from justice. If he successfully hides or conceals himself, so as to evade punishment for his crime, although such concealment may be upon his own premises, he is as much a fugitive from justice as if he had escaped into Canada."

However, the tolling of the one year limitation under Section 541.220 is immaterial under the facts you state because the information was filed within one year under Section 541.210.

#### CONCLUSION

1. Under Section 541.210 an information or indictment in a misdemeanor must be filed within one year after the commission of the offense but service of the warrant on the defendant within one year is not required.



Honorable Don E. Burrell

2. Under Section 541.220, RSMo 1959, the one year statute of limitations imposed by Section 541.210, RSMo 1959, is tolled during the period that the defendant has left the state or concealed himself within the state in order to avoid prosecution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

GWD:bj:jh

INSURANCE:

Articles of Incorporation of  
The Frontier Life Insurance Company

May 24, 1963

OPINION NO. 228

Honorable Jack L. Clay  
Superintendent of the  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Sir:

Receipt is acknowledged of your letter of May 22, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed The Frontier Life Insurance Company, which Declaration of Intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JLO:df

INSURANCE:

Articles of Incorporation of  
Jefferson Life Insurance Company

May 24, 1963

OPINION NO. 229

Honorable Jack L. Clay  
Superintendent of the  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Sir:

Receipt is acknowledged of your letter of May 24, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Jefferson Life Insurance Company, which Declaration of Intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

INSURANCE: Articles of Incorporation of Vico Insurance Company

May 28, 1963



Honorable Jack L. Clay  
Superintendent, Division of  
Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Clay:

Pursuant to your request of May 24, 1963, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Vico Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1959, and not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JLO'M:lt

INSURANCE: Articles of Incorporation of Mark Twain Life Insurance Company.

May 28, 1963



Honorable Jack L. Clay  
Superintendent, Division of  
Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Clay:

Receipt is acknowledged of your letter of May 24, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Mark Twain Life Insurance Company, which Declaration of Intention also included a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

JLO'M:lt



September 9, 1963

Honorable Walter J. Meyer  
Representative, Fourth District  
St. Louis County  
9495 Yorktown Drive  
St. Louis 37, Missouri



Dear Mr. Meyer:

This is in response to your request for an opinion of this office concerning the rights and powers of the Mayor and Board of Aldermen of Bellefontaine Neighbors, a city of the fourth class.

You have inquired:

" \* \* \* whether the appointment by the mayor of . . . officers, after their removal by the board of aldermen, is an effective appointment and if such officers are entitled to the compensation provided for such offices. \* \* \*"

Section 79.230, RSMo 1959, provides, in part, as follows:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer," etc.

Section 79.280, RSMo 1959, contains the following language:

"If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular

meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

We construe your inquiry to relate solely to appointive city officers, and not elective city officers.

Our analysis of these statutes leads us to the following conclusions:

1. Section 79.280 authorizes the mayor to appoint temporary officials when a vacancy occurs. This, of course, is necessary for the continued functioning of the city.
2. At the next regular meeting of the board of aldermen, the mayor must submit the name of a person to fill the vacancy as the permanent official. Section 79.280.
3. If such permanent appointee fails to get a majority vote of approval by the board of aldermen, such appointee is rejected.
4. The mayor then can appoint a temporary official to act until the next regular meeting.
5. At the next regular meeting, the mayor must submit for permanent appointment either the temporary appointee or someone else. Section 79.280.
6. While the mayor may appoint as a temporary official one who has been rejected, he may not resubmit any person as a permanent appointee who has been rejected. That is, the mayor must submit a new name and cannot continue to resubmit the old, rejected name.
7. Temporary appointees are entitled to the pay for the office during the period of their temporary appointment only.
8. Where an official has been removed under Section 79.240 by a two-third vote of the board of aldermen, it is not proper for the mayor to submit such person for a permanent appointment, but it does not prevent such person from being a temporary appointee of the mayor, assuming that appointee is otherwise suitable.

Honorable Walter L. Meyer

#3

While the statute does not clearly delineate the authority of the mayor and the board of aldermen when a so-called impasse is reached in the appointment of permanent officials of a fourth class city, it seems clear from the statute that the mayor is given plenary authority in the appointment of temporary officials. Yet, the board of aldermen has the absolute right to approve the appointment of permanent officials, and hence the mayor cannot frustrate the absolute power of the board of aldermen by resubmitting appointees for permanent appointment who have been rejected.

We hope the foregoing views of this office will aid you in the resolution of this problem.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

By

J. Gordon Siddens  
Assistant Attorney General

JGS:ml



COUNTY HOSPITALS: The single monthly voucher permitted in Section  
COUNTY COURTS: 205.190(4) to obtain a warrant for payment of  
WARRANTS: county hospital expenses must be properly  
authenticated and must contain information showing  
that the claims to be paid are for purposes within the control of  
the hospital board and within the statute, but need not contain further  
detailed description of the individual claims to be paid.

September 3, 1963

Opinion No. 240

Honorable Clyde E. Rogers  
Prosecuting Attorney  
Howard County  
Fayette, Missouri



Dear Mr. Rogers:

This opinion is given in response to your request of  
May 29, 1963, for an official opinion of this office. You  
inquire whether under the provisions of Section 205.190(4),  
RSMo 1961 Supp.,

"... the voucher provided for must con-  
tain a detailed listing of each person to  
be paid, the purpose of each payment and  
the amount to be paid. (Or must the voucher)  
... only state, 'for payment of hospital  
employees and the current expenses of the  
hospital for the month of \_\_\_\_\_' and list  
the gross sum." (Paren. added)

As you are aware Section 205.190(4) was amended in 1961  
by House Bill 396, Missouri Laws, p. 522, so that it presently  
provides:

"The board of hospital trustees shall  
make and adopt such bylaws, rules and  
regulations for their own guidance and  
for the government of the hospital as may  
be deemed expedient for the economic and  
equitable conduct thereof, not inconsistent  
with sections 205.160 and 205.340 and the  
ordinances of the city or town wherein  
such public hospital is located. \* \* \*  
They shall have the exclusive control of  
the expenditures of all moneys collected to

the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board. The hospital board may once each month present to the county court a single voucher authorizing the court to issue a single warrant against the hospital fund for a sum payable to the board to be used for the payment of the hospital employees and the current expenses of the hospital for the month."

We have underscored the sentence added by House Bill 396 which relates to our present inquiry.

Since the issue here is created by this sentence added by House Bill 396 to Section 205.190(4), it will be helpful to ascertain the purpose for the addendum.

Section 50.190, RSMo 1959, concerning county warrants, provides in part:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. \* \* \*"

Thus, prior to the 1961 addendum to Section 205.190(4), the county court could not issue one monthly warrant covering many claimants to the county hospital board of trustees who would then pay the individual claimants, because of the above quoted provisions of Section 50.190. The obvious purpose of the 1961 addendum to Section 205.190(4) was to remove the restricting effect of Section 50.190, and thereby the current expenses of the hospital now may be paid each month by a single voucher and a single warrant covering all claims.



Prior to 1961 every claim was paid by a separate warrant. This in effect (although not by design) provided the county court with a detailed itemization as to the date, amount, claimant, purpose, etc., of every claim. Since 1961, a single monthly voucher and warrant covers all claims. The question now arises whether the single monthly voucher must provide the county court with a detailed itemization of every claim.

The information provided the county court should be sufficient for it to perform its functions under the county hospital statutes. What are the relative functions of the county court and the board of hospital trustees under Section 205.190(4)?

Section 205.190(4), quoted supra, provides that the board of hospital trustees "shall have exclusive control of the expenditures of all moneys collected to the credit of the hospital fund" but that the moneys shall be paid out "only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

These provisions were judicially construed in the case of State ex rel. Holman v. Trimble, 316 Mo. 1041, 293 SW 98, wherein the Supreme Court of Missouri approved the decision of the Kansas City Court of Appeals, stating:

"The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of

the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is to determine whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. \* \* \* 1.c. 101

As clearly stated by the court, supra, the determination of the validity of all claims on hospital funds is the exclusive function of the hospital board and not the county court. The limited function of the county court under the provisions of Section 205.190(4) is to determine that the vouchers are properly authenticated, for purposes within the control of the hospital board, and within the purposes of the statute. In order to make these determinations, the county court must have a minimum of information upon which to base its decision but not more.

#### CONCLUSION

Upon the foregoing considerations, it is the opinion of this office that the single monthly voucher permitted in Section 205.190(4) to obtain a warrant for payment of county hospital expenses must be properly authenticated and must contain information showing that the claims to be paid are for purposes within the control of the hospital board and within the statute, but need not contain further detailed description of the individual claims to be paid. We are further of the opinion that a properly authenticated voucher containing the description, "for payment of hospital employees and the current expenses of the hospital for the month of \_\_\_\_\_," would meet these requirements.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General



June 17, 1963

OPINION REQUEST NO. 245  
ANSWERED BY LETTER

Honorable Charles B. Faulkner  
Prosecuting Attorney  
County of Lawrence  
Mount Vernon, Missouri

Dear Mr. Faulkner:

This is in response to your request for an opinion of this office concerning the proposed sale of certain land presently owned by Lawrence County.

We find that two of the questions posed by your request have been answered by previously issued opinions of this office, which opinions have been reviewed and found to correctly state the law at this time. Although the opinions are enclosed herewith, we will summarize them as they pertain to your questions:

1. Although the county court may sell real property through a duly appointed commissioner as provided for in Section 49.280, RSMo 1959, the court may also sell the property itself and make the deed itself. Opinion to Honorable J. R. Gideon, February 18, 1949. However, because of the practical problems involved in execution of the deed by a three man court, it might be advisable to adhere to the procedure outlined in Section 49.280.

2. The proceeds of real property sold by a county go into general revenue of the county. Opinion to Honorable A. L. Wright, September 28, 1945. Because of its relationship to the matters under consideration here, we also forward a copy of an opinion of this office issued to the Honorable W. Frazier Baker on August 8, 1957, which holds that the proceeds of such a sale may be spent in the same year that they are received even though they were not included in the budget for that year.

Honorable Charles B. Faulkner -2-

Inasmuch as the statutes relating to sale of real property by a county court do not require that such disposition take place at public auction or after the taking of bids, it is the opinion of this office that the sale of county owned real property may be consummated by private sale. The county court must, of course, act in good faith, exercising the degree of prudence which guides careful men in their own business affairs regardless of what procedure is followed in the sale of county property.

We trust that the foregoing will be of assistance to you in resolving the questions stated in your letter.

Very truly yours

AJS:im

THOMAS F. EAGLETON  
Attorney General

Enclosures (3)

TAXATION.  
CITIES, TOWNS,  
AND VILLAGES:

A village is subject to constitutional limitations and to specific statutory limitations on its power and authority to levy taxes.

Opinion No. 247

June 24, 1963



Honorable Maurice Schechter  
State Senator, 13th District  
Missouri Senate  
Jefferson City, Missouri

Dear Senator Schechter:

This is in reply to your letter of June 5, 1963, requesting an opinion and which letter reads as follows:

"On behalf of one of the Villages in my district, I would appreciate receiving your opinion with respect to subsections (37) and (38) of the above statute.

"Under the above sub-divisions, how far may such Village proceed in levying taxes, and are there any restrictions with respect to levying taxes either on real or personal property, or levying any other taxes that the Village officials may desire?

"I would appreciate receiving your opinion on this matter at your earliest convenience."

We first point out that the taxing power of political subdivisions is limited by Sections 11(a), 11(b) and 11(c) of Article X of the 1945 Constitution of Missouri. The villages in your district are subject to these constitutional limitations. In addition, there are other statutory limitations to which the villages are subject, which are more restrictive than the constitutional limitations and which we will point out subsequently.



Section 1 of Article X of the Constitution makes provisions for the taxing power of political subdivisions and reads as follows:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

In the case of Emerson v. Mound City, 335 Mo. 702, l.c. 717-719, the court said:

"This leads us to observe that cities and other like municipal corporations do not derive their power and authority to levy taxes for municipal purposes directly from the Constitution. The power to levy and collect taxes is a legislative power (61 C.J. 552 and 554) vested by the Constitution in the General Assembly, popularly called the Legislature. The State Constitution, other than vesting all legislative power in the Legislature, only limits the taxing power which the Legislature may vest in municipal corporations as branches of the sovereign governing power. Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from the law-making power. In 6 McQuillin Municipal Corporations (2 Ed.), section 2523, page 275, the law is stated thus: 'The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized. Therefore as municipal corporations have no inherent power of taxation, consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes.

\* \* \* \*

"In State ex rel. Sedalia v. Weinrich, supra, the court said: 'It was held in State ex rel. v. Van Every, 75 Mo. l.c. 537, that the limitations upon the taxing power of cities found in Section 11, Article X, of the Constitution are self-enforcing, but that the sections conferred upon a city no power to tax, that such power is derived "from acts of the General Assembly and not directly from the constitutional provision we are considering" . . . But the amount of the levy for current expenses cannot exceed the levy which is authorized by the Legislature if the doctrine of the Van Every case is sound. That doctrine was unanimously reannounced in Brooks v. Schultz, 178 Mo. l.c. 227.'

"The Legislature has power to still further reduce and to restrict the rates of taxation specified as maximum rates by Section 11, Article X, but not to increase same in any manner or for any purpose (State ex rel. Johnson v. A. T. & S. F. Ry Co., 310 Mo. 587, 594, 275 S.W. 932), and it may direct and compel such city to use a designated part of its annual revenues for a designated purpose for which the city receives a special benefit (State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S.W. 524; State ex rel. Reynolds v. Jost, 265 Mo. 51, 175 S.W. 591), but that does not give the city the power to levy a tax in excess of the constitutional limitation. (Strother v. Kansas City, 283 Mo. 293, 223 S.W. 419; State ex rel. Zoological Board v. St. Louis, 318 Mo. 910, 1 S.W.(2d) 1020.)"

From these authorities, it is apparent that a village does not have inherent power to levy and collect taxes but a village must be able to point to some specific statute from which it can derive the power to levy and collect taxes. This statutory power for a village is contained in Sections 80.430 to 80.490, RSMo 1959. Paragraphs (37) and (38) of Section 80.090, RSMo 1959, referred to in your letter, provide for power in the board of trustees for certain purposes and we quote portions of that statute as follows:

"80.090. Trustees - power to pass certain ordinances. - Such board of trustees shall have power:

\* \* \* \*

"(37) To impose and appropriate fines for forfeitures and penalties for breaking or violating their ordinances;

"(38) To levy and collect taxes;"

The general grant of authority in this section "to levy and collect taxes" cannot be construed as authority for a village to levy and collect any and all kinds of taxes. In *Shively v. City of Keytesville*, 238 SW2d 682, 1.c. 684, it is said:

"The rule is well settled that 'municipalities in Missouri may only levy taxes in the manner and for the purposes granted by the state.' *First Nat'l Bank of St. Joseph v. Buchanan County*, 356 Mo. 1204, 205 S.W.2d 726, loc. cit. 729. 'A power to tax for general purposes does not include a power to tax for special or unusual purposes.' 64 CJS, *Municipal Corporations*, § 1992. \* \* \*"

The case of *Carter Carburetor Corporation v. City of St. Louis*, 203 SW2d 438, dealt with the validity of an earnings tax in St. Louis. As a basis for the tax, the City relied on the provision in the charter which provided the City may "assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation." The Supreme Court of Missouri, en Banc, held that the earnings tax was not authorized by that provision of the charter.

Likewise, we are of the opinion that paragraph (38) of Section 80.090, quoted above, is not a carte blanche grant of power to levy and collect all manner and kinds of taxes. Rather, the power of a village to levy and collect taxes is subject to constitutional and statutory limitations and a village has only the power to impose such taxes as are specifically authorized.

With regard to the statutory restrictions on the tax that may be imposed by a village, we specifically refer you to Sections 80.460 and 80.470, RSMo 1959. Section 80.460 designates the maximum rate of tax and reads in part as follows:

"\* \* \*it shall be the duty of such board of trustees to establish by ordinance the annual rates of tax levy for the year for municipal purposes upon all subjects and objects of taxation within such town, which tax shall not exceed the maximum rate for general municipal purposes of fifty cents on the one hundred dollars assessed valuation; \* \* \*."

This section further provides for an increase in this maximum rate upon a two-thirds vote of the people, which increase so voted is limited to a maximum rate of taxation not to exceed thirty cents on the one hundred dollars assessed valuation.

Section 80.470 provides additional tax levies for special tax purposes and these maximum rates may not be exceeded for a village for such special purposes.

Section 71.010, RSMo 1959, is applicable to all cities, towns and villages and requires that all ordinances be in conformity with the state law upon the same subject. Section 71.610, RSMo 1959, makes a further restriction upon license taxes and said section reads as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

We have attempted to point out some of the specific statutory restrictions on the power of a village to levy and collect taxes. Absent information as to a particular tax levy contemplated by the village, we cannot be more specific in answering your request. In general, it may be said that a village does

not have inherent power to levy and collect taxes and that a village must point to some specific statute for authority to levy and collect any tax. Section 80.090, RSMo, does not authorize a village to levy all manner and kinds of taxes. The ordinances of the village levying a tax must be in compliance with the state law and the village is subject to the restrictions and limits imposed by the statutes of the State of Missouri in levying and collecting any tax.

CONCLUSION

A village is subject to constitutional limitations and to specific statutory limitations in its power and authority to levy taxes, and may levy only those taxes, and in the amounts, specifically authorized.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

WWW:lt



June 11, 1963



Honorable Wendell D. Rosenbaugh  
Representative, Clay County, 1st District  
House of Representatives  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Rosenbaugh:

You have requested the opinion of this office on the  
following question:

Ward 21 of Kansas City presently  
constitutes part of Gallatin Township  
in Clay County. The voters in that  
part of Gallatin Township outside  
Ward 21 elect a party committeeman and  
committeewoman and the voters of Ward  
21 elect another committeeman and  
committeewoman. In the event the  
county court, under the authority of  
Section 47.010, RSMo., should decide  
to create additional townships by a  
division of Gallatin Township, could  
such action be taken in a manner which  
would permit the county court by  
dividing Ward 21 among several townships  
to give the voters in Ward 21 additional  
representation on the county committee.

Section 120.770, RSMo., provides for the election of a  
county committeeman and committeewoman in each election  
district. Section 120.760, RSMo., provides that the term  
"election district" shall include wards and townships, but  
further specifically provides that such term "shall not  
apply to any subdivision less than a ward within any city  
subdivided into wards or to any subdivision less than a  
township in any county."

Honorable Wendell D. Rosenbaugh . . . . . June 11, 1963

In an opinion of this office dated February 14, 1952, to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, copy of which is enclosed, this office ruled that upon the creation of Ward 21 of Kansas City in Clay County, it became an election district separate and distinct from Gallatin Township entitled to its own committeeman and committeewoman and that the township within whose boundaries Ward 21 was located was also entitled to one committeeman and one committeewoman who were to be voted on only by the voters of such township residing outside of Ward 21. In an opinion of this office dated October 1, 1962, to Honorable Warren E. Hearnes, Secretary of State, copy of which is also enclosed, the foregoing opinion was confirmed and it was ruled that the voters of a township residing outside of a ward may vote for committee members for such township but that the voters of the ward were entitled to vote only for committee members from such ward.

It follows that in the event of a division of Gallatin Township by the county court into additional townships, such action would have no effect whatever upon the representation of Ward 21 on the county committee. That is, irrespective of the number of townships in which portions of Ward 21 would be located after such division, Ward 21 would remain a single election district separate from the various townships in which it was located, so that the voters in Ward 21 would continue to vote for only one committeeman and one committee-woman to represent such ward and would have no vote on the election of township committee members. Of course, each new township so created would be entitled to its own committeeman and committeewoman to be elected by the voters of each such new township residing outside of Ward 21.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

~~Enclosures~~

DRAINAGE DISTRICTS: Substantial changes in plan for reclamation must be effected by the procedures set out in Section 242.310, RSMo 1959.

OPINION NO. 251

August 29, 1963



Honorable David Rolwing  
State Representative  
Mississippi County  
Charleston, Missouri

Dear Mr. Rolwing:

This is in response to your request for an opinion of this office which request reads as follows:

"The board of supervisors of the Big Lake Drainage District in Mississippi County has considered revising part of the district's present drainage system in a manner which will be described below. I am requesting your opinion as to whether this may be done under existing laws and, if so, whether the board could do it without resort to the rather cumbersome procedure set out in Section 242.310, RSMo 1959.

"The district presently maintains a ditch through what is known as the Big Lake Basin, a marshy area of little or no agricultural value, which acts as a natural reservoir during extended periods of precipitation. The present ditch system in the basin is so located that it fills up with silt and debris.

"The proposed revision would provide for the abandonment of the ditches presently in the basin and the construction of a diversion ditch with a spoil bank on the south side to impound water in the basin.

The revised system would improve drainage throughout the district and be considerably more economical to maintain. Moreover, a portion of the basin would then become a lake which could be used for fishing while other areas of the basin would be drained so that they could be used for farming.

"It might be noted that the original plan of reclamation included the proposal that the basin would be drained. However, after five or six years it was found that this was impossible. The revised system would permit part of this original plan to be fulfilled. The only adverse effect of the existence of the lake would be that the capacity of the area which it would cover would henceforward not be able to hold as much water as it does now during rainy periods. The runoff would then be somewhat increased with regard to the landowners in the lower portions of the district.

"In summary, the questions I wish to put to you are these:

"1. Does the district have a free hand to abandon the two segments of ditch through the basin and replace them with the relocated diversion ditch? Will this action be a breach of the original plan of reclamation? Will this action leave the board open for liability?

"2. Is it within the jurisdiction of the district to allow or not to allow water to be impounded in the natural reservoir?"

Examination of Chapter 242, RSMo 1959, reveals two methods relevant to this inquiry by which the reclamation plan of a drainage district organized in circuit court may be amended. One is the method set out in Section 242.310, which requires the filing of a petition in circuit court, and notice to all landowners

in the district with a corresponding right to all affected by the change to appear and object to the proposed change. The other method is that provided by Section 242.340 which permits the board of supervisors of the district to revise the plan, under some circumstances, without recourse to the courts.

We believe that a reading of subsection 1 of Section 242.340 indicates that it was not intended by the Legislature to permit changes as broad as those described in your request. That subsection reads as follows:

"Whenever it shall appear to the board of supervisors, after the plan for reclamation has been filed with the clerk of the court organizing said district and work has progressed thereunder, that some of the ditches or other improvements called for in said plan are inadequate and are not affording or giving to the lands adjacent to such ditch or ditches or other improvements, substantially the same outlets for drainage or protection from overflow that are afforded other lands in the district equally taxed, the board of supervisors of said districts shall have the power, authority and right, upon the recommendation of its chief engineer, to enlarge or cause to be enlarged any ditches or other improvements set out in the plan for reclamation and to construct or cause to be constructed such additional ditches, levees, canals and other improvements that may be necessary to afford such lands substantially equal outlets for drainage and protection from overflow that are afforded the other lands in said district, equally taxed, as a whole."

We are cognizant of the fact that our Supreme Court has considered powers of the board of supervisors other than those enumerated in Section 242.340 in determining whether a board could effect various changes in the drainage system. In *City of Hardin v. Norborne Land Drainage District* (Mo. Sup., 1950), 232 SW2d 921, 924, a drainage district was permitted to increase



the height of its levees, without resorting to the procedure spelled out in Section 242.310, after the court noted that the board had the power and duty to "maintain and protect the plan for reclamation", Section 242.330, as well as other functions enumerated in Section 242.190.

However, we do not regard the City of Hardin case as authority for holding that the changes described in your request can be accomplished solely by act of the board. In that case, the drainage district was attempting to bring about exactly that which was contemplated by the original plan for reclamation. The sole departure from the plan was the raising of the levees above the height originally specified, and this change was made necessary only because efforts of other drainage districts had raised the flood water level to the point where the old levees were ineffective.

The factual situation posed by your request is, we believe, readily distinguishable from that in City of Hardin. In order to accomplish the proposed change, some existing ditches of the Big Lake Drainage District would have to be completely abandoned; a diversion ditch not contemplated by the plan for reclamation would have to be constructed; and a portion of the Big Lake Basin (which the plan for reclamation provides will be drained) will in fact be flooded to form a permanent lake. Such changes, regardless of how desirable they may be, amount to a substantial departure from the original plan for reclamation. In our opinion, it was for such changes that Section 242.310 was written into the drainage district law; and we believe that the procedures set out in that section should be implemented if these changes are to be effected.

#### CONCLUSION

It is, therefore, the opinion of this office that in order for a drainage district organized in circuit court to abandon established ditches and construct a new one with the effect of creating a lake, none of which was contemplated by the original plan for reclamation, the board of supervisors must amend the plan for reclamation by means of the procedures set out in Section 242.310, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

COUNTY JUDGES:

EXPENSE PAYMENTS TO  
COUNTY JUDGES:

Mileage traveled by county court judges from their homes to a place of assembly to tour the county on a road inspection in one automobile is "necessary" travel on "official business" within the meaning of Section 49.120, and the judges are entitled to be reimbursed therefor.

OPINION NO. 253

August 15, 1963

Honorable James C. Skaggs  
State Representative  
Reynolds County  
Ellington, Missouri



Dear Mr. Skaggs:

This acknowledges receipt of the opinion request of July 10, 1963. You mentioned several facts in your letter, as well as the recent telephone conversation you had with this office, concerning the county court of Reynolds County. The county court meets Monday through Friday at the county courthouse but does not hold court on Saturday. On Saturdays, or any other day when the court is not in session, the county judges might drive their personal automobiles to the county courthouse, at which time they will get into the automobile of one of the judges and travel about the county inspecting county roads. Therefore, the question you ask with reference to these facts is whether each judge is allowed a mileage fee from his home to the county courthouse.

The statutory provision which allows a travel mileage fee for county judges of fourth class counties is found at Section 49.120, RSMo Cum. Supp., 1961. This section reads as follows:

"In all counties of the fourth class in this state, the judges of the county court shall receive for their services fifteen dollars per day for the first ten days they are necessarily engaged in holding court in each month and ten dollars per day for each day they are necessarily engaged in holding court thereafter in each month; and shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place

of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem herein fixed shall be paid at the end of each month and the mileage shall be paid at the end of each month upon the presentation of a bill, by each county judge, setting forth the number of miles necessarily traveled." (Emphasis added)

It is our opinion that the statutory language allowing a ten-cent fee for each mile "traveled in going to and returning from the place of holding county court" carries with it the implied requirement that the travel done be for the purpose of actually holding court. Any other construction would clearly violate the obvious intent of the Legislature to compensate county court judges only when they have to travel to the place where court is to be held. To say they could travel to the place where court is normally held, on days when the court is not in session, and still be paid a mileage fee would do violence to the spirit and letter of the law, and lead to absurd consequences. A literal construction of a statute cannot defeat a contrary legislative intent, State ex rel. v. Allen, K.C. App. 255 SW 2d, 144, 148(1953).

The remaining question is whether the above described travel was "necessary" and "on official business." The necessity of any travel will always depend upon the facts of each individual occurrence and every situation cannot be covered by this letter. The inspection of county roads has been deemed to be part of the "official business" of the county court. No one questions the right of the court to receive reimbursement for mileage traveled while making such inspection. The members of the court must in some way reach the point where the court inspection actually commences and travel for the purpose of reaching that point must be said to be "necessary" to accomplish such inspection. If each judge inspected the county roads separately in their individual automobiles, each would be entitled to be reimbursed for mileage traveled from their respective residences. It would be unreasonable to hold that because the court chose

Honorable James C. Skaggs - 3

a more inexpensive method of travel the individual members would not be allowed travel expenses to the common meeting place. Therefore, it is the opinion of this office that if the place chosen as the assembly point is a reasonable and convenient one under the circumstances travel to this point is "necessary" travel on "official business" for which the judges may properly be reimbursed.

Conclusion

Mileage traveled by county court judges from their homes to a place of assembly to tour the county on a road inspection in one automobile is "necessary" travel on "official business" within the meaning of Section 49.120, and the judges are entitled to be reimbursed therefor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

EGB:df

June 27, 1963



Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri

Dear Mr. Burlison:

In your letter of June 10, 1963, you request an opinion from this office as to whether the county court of Cape Girardeau County may borrow from the school surplus funds money to be used for road purposes, such money to be repaid with interest when the funds for road purposes are paid into the County Treasury. You call attention to Sections 171.010, 171.110, 50.040 and 54.140, RSMo 1959, as possibly having some bearing on the question submitted.

I am enclosing herewith an opinion issued by this office on January 23, 1947, to Mr. O. F. Preusse, County Treasurer, Perry County, Perryville, Missouri, holding that the money and property belonging to the school fund under Chapter 171 can be disposed of only under the provisions of said chapter. The moneys and properties in this fund are generally referred to as the capital school funds and only the income from these funds can be used for school purposes. These funds are different from the money made available each year from taxation or other sources for the support of the public schools and which are required to be kept by the County Treasurer as provided in Section 54.160. I do not see how the capital school funds can be used in any manner in connection with the problem under consideration.

Section 50.040, RSMo 1959, reads as follows:

"Whenever there are outstanding any legal  
county revenue warrants of any county  
bearing six per cent interest which will be



redeemed by the taxes of the current year, and there are school moneys in the hands of the county treasurer belonging to the various districts which will not be required for the support of the public schools before the date when such revenue warrants will be paid, the county courts are authorized to direct the county treasurer to invest such surplus school moneys in the revenue warrants, and hold them for the use and benefit of the school districts until the money for the redemption of such warrants is received into the county revenue fund, when such money shall be applied to their payment."

Under this section, whenever there are outstanding any legal county revenue warrants and there are school moneys in the hands of the county treasurer belonging to the various school districts which will not be required for school purposes before the revenue warrants may become due, the county court may direct the county treasurer to invest such surplus school money in such revenue warrants and hold them for the use and benefit of the school district from which the funds were withdrawn. When this is done, it is, strictly speaking, not a borrowing from the school funds but merely a using of the school fund to invest in legal warrants that are outstanding against the county.

Enclosed is an opinion dated July 21, 1941, to Honorable W. H. Holmes, Prosecuting Attorney of Maries County, Vienna, Missouri, in which it was held that warrants should not be issued in excess of the amount budgeted and warrants issued in excess of the anticipated revenue are illegal and void. Another opinion enclosed was issued on November 16, 1936, to Honorable Paul N. Chitwood, Prosecuting Attorney, Reynolds County, Ellington, Missouri, stating that when the anticipated revenue is exhausted no more warrants should be issued. We are enclosing these opinions in the hope that they may be useful to you and the county court in resolving the difficulty the county is now having with its financial affairs.

Honorable Bill D. Burlison -3-

I am sure that you are familiar with the fact that the county court may issue tax anticipation notes under certain conditions as provided for in Chapter 50, RSMo 1959. I am enclosing a copy of an opinion dated March 31, 1950, to Honorable A. L. Gates, Prosecuting Attorney, Moniteau County, California, Missouri regarding the issuance of tax anticipation notes by the county.

Concerning the specific question you submit, it is our opinion that surplus funds in the hands of the county treasurer belonging to the various school districts may be invested in outstanding legal warrants of the county under the provisions and conditions as provided for in Section 50.040, RSMo 1959.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

MM:lt  
Enclosures

RECORDS:  
PUBLIC RECORDS:  
DESTRUCTION OF RECORDS:

Definition of public records and  
procedures for microfilming and  
destruction.

October 4, 1963



OPINION NO. 256

Mr. William L. Wyss, Director  
Feed and Seed Division  
Department of Agriculture  
Jefferson City, Missouri

Dear Mr. Wyss:

This is in answer to your letter of June 11, 1963,  
requesting an opinion from this office, which letter reads  
as follows:

"We have a letter from Mr. Thad Fife,  
Director of Safety and Fire Prevention,  
stating that the files from the emergency  
hay program which was in progress in 1952,  
1953, and 1954 constitute a fire hazard  
in their present location. We would like  
to know whether or not it would be legally  
proper for us to destroy these files. As  
you may remember, this was a joint state  
and federal drought emergency program.  
Occasional reference to these files from  
the standpoint of federal audits come up;  
however, our information is that these  
records are on file in the Comptroller's  
Office on microfilm.

"If it is proper that these records be  
destroyed, we should like to do so.  
As a consequence, we would like to have  
your opinion as to the legality of such  
action."

Mr. William L. Wyss, Director

In answering your question, we first determine whether the files from the emergency hay program are public records. In this connection, we refer to the case of State v. Henderson, 169 SW2d 389, in which the Court discussed what documents filed in public offices are public records and, at l. c. 392, said:

"[2] In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; Robinson v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.2d 26."

Again, in the case of Disabled Police Veterans Club v. Long, 279 SW2d 220, the Court defined the term "public records" and, at l. c. 223, the Court said:

"[6] Independently of the statute the term public records covers not only papers expressly required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office. International Union, etc. v. Gooding, 251 Wis. 362, 29 N.W.2d 730, 735; Conover v. Board of Education, etc. 1 Utah 2d 375, 267 P. 2d 768, 770; People v. Shaw, 17 Cal. 2d 778, 112 P.2d 241, 259."

Under these definitions given to public records by the Court, it would appear that at least a substantial portion of the files from the emergency hay program would constitute public records because they would be written memorials made by a public officer within his authority, and the files would constitute a convenient, appropriate and customary method of discharging the duties of the officer.

Mr. William L. Wyss, Director

It may well be that a portion of the files would not come within this definition of public records. The portion of the files which were not public records could be destroyed. This office is in no position to make a determination as to which portions of the files would or would not constitute public records. Such a determination must be made in the first instance by the public officer in charge of the records and must be left to his discretion.

As to that portion of the files which would constitute public records, the general rule that such records should be preserved would apply. This rule is found in 45 Am. Jur., Records, Section 12, page 425, as follows:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession, and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made.\* \* \*"

In accordance with this general rule, the records could be destroyed only under authority of an act of the Legislature. Such legislative authority for destruction of the records is found in Sections 109.120 and 109.140, RSMo 1959, the applicable portions of which sections, as amended by Laws of 1963, House Bill No. 142, read as follows:

"109.120. Records reproduced by photostatic process--cost--marginal releases prohibited

1. The head of any business, industry, profession, occupation or calling, or the head of any state, county or municipal



Mr. William L. Wyss, Director

department, commission, bureau or board, may cause any and all records kept by such official, department, commission, bureau, board or business to be photographed, microphotographed, photostated, or reproduced on film and the judges and justices of the several courts of record within this state may cause all closed case files more than five years old to be photographed, microphotographed, photostated, or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce the records on the film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

"109.140. Reproduction of original records--  
disposal or destruction

1. When the photostatic copies, photographs, microphotographs or reproductions on films are placed in conveniently accessible files and provisions made for preserving, examining and using them, the head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who may authorize the disposal, archival storage or destruction of the records or papers from which the photographic copies were made."

In your letter you state that it is your information that the records are on microfilm in the comptroller's office. In order to be in compliance with the procedures set forth in the statutes quoted above, it must be ascertained that the records have been reproduced on the microfilm and placed in conveniently

Mr. William L. Wyss, Director

accessible files. Provisions must be made for preserving, examining and using them. When such has been done, the Commissioner of Agriculture, as the head of the Missouri Department of Agriculture, should certify such facts to the Governor. After receiving such certification, the Governor may authorize the disposal, archival storage or the destruction of the records and files from the emergency hay program.

#### CONCLUSION

It is therefore the opinion of this office that at least a substantial portion of the files from the emergency hay program now held in the Missouri Department of Agriculture are public records and must be preserved. It is proper for microfilm copies to be made of such public records and provisions made for preserving, examining and using them. When the head of the State Department of Agriculture has certified such facts to the Governor, the Governor may authorize the disposal, archival storage or destruction of such records.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

WWW:sr;bj

MISSOURI STATE HIGHWAY PATROL:  
MUNICIPALITIES:  
POLITICAL SUBDIVISIONS:  
COOPERATION BETWEEN POLITICAL  
SUBDIVISIONS:

(1) Section 70.220, RSMo 1959, authorizes a municipality to enter into a contract with another municipality or political subdivision for common police protection in accordance with the provisions of Sections 70.210 through 70.325.

(2) Section 70.220 requires that a state agency be authorized to enter into such a contract and to date the Highway Patrol has not received such authorization from the Legislature.

November 4, 1963

Opinion No. 258

Honorable Omer H. Avery  
Senator, Twenty-first District  
103 Troy Building  
Troy, Missouri



Dear Senator Avery:

This is in answer to your letter requesting an opinion from this office concerning the rights and liabilities of a city police officer acting without the limits of the city in conjunction with the Missouri State Highway Patrol, or some other police agency.

After reading the letter from Everett Van Matre, City Counselor of Mexico, Missouri, enclosed with your inquiry, we interpret your question to be whether a city policeman may act outside the limits of his city in cooperation with the Missouri State Highway Patrol, county sheriffs or policemen of other cities under a contract of cooperation authorized under Article VI, Section 16, Constitution of Missouri, 1945, and Section 70.220, RSMo 1959. Article VI, Section 16, of the Constitution of Missouri provides as follows:

"Co-operation by local governments with other governmental units.--Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities, or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Section 70.220 reads as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

In an opinion of this office rendered May 15, 1963, to the Honorable E. J. Cantrell, State Representative, we held that a city could enter into a contract with another municipality for a system of common police protection. A copy of this opinion is enclosed herewith. Of course, each party to the contract must be authorized to enter into such a contract as provided by Section 70.230. Such a contract could provide for mutual cooperation between policemen of a municipality and county sheriffs or policemen of another municipality. However, such a contract could not give a police officer any greater authority than that possessed by a police officer of either of the parties to the contract.

Insofar as a state agency is concerned, Section 70.220 requires that before such a contract can be executed, the state agency must be "duly authorized" to so do.

Thus, the question to be resolved is whether the State Highway Patrol has been authorized to enter into such an agreement.

The authorization for and the powers and duties of the Missouri State Highway Patrol are set out in Chapter 43, RSMo 1959. Although Section 43.180 authorizes patrolmen to assist the policemen of any city, there is no authority allowing the Patrol to enter into a contract with a municipality that would extend the jurisdiction and powers of the policemen of such municipalities or of the members of the patrol. Such authority could only be given to the patrol by its governing body, the Legislature, and it has not been so given to date.

#### CONCLUSION

(1) Section 70.220, RSMo 1959, authorizes a municipality to enter into a contract with another municipality or political subdivision for common police protection in accordance with the provisions of Sections 70.210 through 70.325.

(2) Section 70.220 requires that a state agency be authorized to enter into such a contract and to date the Highway Patrol has not received such authorization from the Legislature.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JHD:kd



June 25, 1963



Honorable Don W. Owensby  
Prosecuting Attorney  
Buffalo, Missouri

Dear Mr. Owensby:

This is in answer to your letter dated June 14, 1963, in which you request an official opinion from this office.

In your letter you ask whether the county assessor of a third class county is entitled to a fee for making an assessment list for nonresident land owners, when the list only shows the value of the real property owned by the nonresident.

You cited to us the case of State v. Gomer, 341 Mo. 107, 101 SW2d 57 (1936). This case held, amongst other things, that a county assessor was not entitled to compensation for making a list containing only real estate. As you will notice the Gomer case interprets several Missouri statutes in reaching its conclusion. Those statutes were changed the year following the writing of this opinion, Laws 1937, Page 570, and appear today in Chapters 53 and 137, RSMo 1959.

On January 26, 1938, and again on December 22, 1938, this office issued its opinion holding that the statutory changes substantially modified the Gomer case. These opinions were written to Mr. O. G. Schell, Assessor of Miller County and Mr. H. I. Phelps, Township Assessor, Salisbury, Missouri, respectively.

In these two opinions we held that the statutory changes entitled the county assessor to compensation for making lists containing only real estate. Since 1937, there have been no substantial alterations in these statutory provisions and therefore we believe our previously written opinions are dispositive of the question you asked. We are enclosing them for your study.

Respectfully submitted,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

EGB:oa  
Encs.

Opinion No. 265  
answered by letter.

September 17, 1963



Honorable Charles D. Trigg  
Comptroller and Budget Director  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested our opinion as follows:

"Is it permissible under the laws of the State of Missouri to purchase tax sheltered annuities for teachers in our State institutions of higher learning from personal service appropriations? It is my understanding to qualify under the Federal statutes for the purchase of tax sheltered annuities the employer must purchase the annuity."

Appropriations for "personal service" are made to provide for the payment of salaries and other compensation to those persons who render personal service to the State or to an agency or instrumentality thereof pursuant to contract or agreement. In this frame of reference, we examine the statutes applicable to state institutions of higher learning.

Section 172.300, RSMo 1959, provides with respect to the state university as follows:

"The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; define and assign their powers and duties, and fix their compensation, and such compensation may include payments

under, or provision for, such retirement, disability, or death plan or plans as the curators deem proper for persons employed by the university and paid out of any of its public funds for educational services, their beneficiaries or estates, and the curators may administer such plan or plans under such rules and regulations as they deem proper; and for these purposes the curators may use state-appropriated or other public funds under their control and pay or transfer such funds into a fund or funds for paying such benefits, and they may enter into agreements for and make contributions to both voluntary and statutory plans for paying such benefits."

Section 175.040, RSMo 1959, provides in part with respect to Lincoln University that the powers and authority of the board of curators shall be the same as those prescribed by statute for the Board of Curators of the State University of Missouri except as otherwise stated in Chapter 175 in matters not here relevant.

Chapter 174, RSMo 1959, provides for the government of the respective state teachers colleges by certain designated boards. Section 174.140, RSMo 1959, grants authority to each such board to appoint teachers and to fix the "terms and conditions" of their compensation, "and to enter into agreements for and make contributions to both voluntary and statutory retirement plans" for such teachers.

The foregoing statutes evidence a common pattern, namely the intent to grant to the respective boards responsible for the operation of the state institutions of higher learning broad authority and discretion to fix the "terms and conditions" of compensation payable to teachers in such institutions including the right to make contributions to both voluntary and statutory retirement plans. These statutes should be liberally construed to effectuate this legislative intent and purpose.

It is our opinion from a review of said statutes, in the light of the legislative intent, that the boards of such institutions of learning may agree, in contracts of employment with

Honorable Charles D. Trigg - 3 -

teachers therein, to purchase an annuity contract for such teachers as part of their compensation or salary, and that payment therefor may be made out of personal service appropriations. However, until such time as the Internal Revenue Service specifically rules that under the terms of a particular contract the amount paid for an annuity to be purchased under the provisions thereof is excludable from the teacher's current income for federal tax purposes, such amount should not be deducted in determining the amount of federal income tax to be withheld by the employer.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr

October 17, 1963

Opinion No. 267 answered  
by letter (O'Malley)

Honorable Robert B. Mackey  
Commissioner of Finance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Mackey:

This letter of advice is submitted in lieu of a formal opinion in answer to your inquiry of June 18, 1963, which reads, in part, as follows:

"However, we call attention to subsection (1) (b) of Section 363.260 RSMo., 1959, which seems to apply here. The first clause thereof permits the total liabilities of a corporation subject to the jurisdiction of the Missouri Public Service Commission to equal 25% of the capital stock and surplus of the trust company. The second clause of this subsection provides that the total liabilities to a trust company of any other corporation may equal 25% of the capital stock and surplus of the trust company. These two clauses are separated by a semi-colon. Following the second clause and separated by a semi-colon is a proviso requiring two-fifths of such total liabilities to be secured as provided therein.

"The problem is whether the proviso as to security appertains to the first clause as well as the second clause of this subsection or whether it is intended only to restrict the 25% limit



imposed upon loans to or liabilities of 'any other corporation'.

"We would appreciate being advised of your opinion with respect to the construction which should be placed upon this subsection, that is, whether loans to a qualified public utility may equal 25% of the capital and surplus on an unsecured basis or whether a percentage of the 25% limitation must be secured in these loans to this public utility."

Subsection (1), (b) of Section 363.260, RSMo 1959, as amended by Senate Bill No. 194, effective October 13, 1963, provides:

"(b) The total liability to such trust company of any foreign nation or of any railroad corporation or of a corporation subject to the jurisdiction of a public service commission of this state, may equal but not exceed twenty-five per cent of the capital stock actually paid in and surplus fund of such trust company; and the total liabilities to such trust company of any individual, partnership, or of any other corporation may equal but not exceed twenty-five per cent of the capital stock actually paid in and surplus fund of such trust company, provided, that at least two-fifths of such total liabilities, if the trust company is located in a city having a population of one hundred thousand or over, and at least one-fifth of such total liabilities, if the trust company is located in a city having a population of less than one hundred thousand and over seven thousand, are upon commercial or business paper actually owned by the person negotiating the same to such trust company and are indorsed by such person

without limitations, or are secured by collateral security having an ascertained market value of at least fifteen per cent more than the amount of the liabilities so secured."

It is readily apparent that subsection (b), quoted above, is composed of two independent clauses separated by a semicolon with the second clause being followed by a proviso. In *Supply Company v. Smith*, 182 Mo. App. 212, l. c. 219, 167 SW 649, the St. Louis Court of Appeals spoke as follows:

"It is also a rule of statutory construction that a proviso should be construed with reference to the immediate preceding parts of the clause to which it is attached."

In *State ex rel. v. St. Louis*, 174 Mo. 125, l. c. 145, 73 SW 623, the Supreme Court of Missouri quoted approvingly from the *American and English Encyclopedia of Law* (1 Ed.), in part, as follows:

"A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing specially for them. \* \* \* The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears; and should be construed with the section with which it is connected. This rule is not, however, absolute, and if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment."

The only change in subsection (1), (b) of Section 363.260, RSNo 1959, by enactment of Senate Bill No. 194 of the 72nd General Assembly, effective October 13, 1963, was to place a

Honorable Robert B. Mackey      - 4 -

comma where a semicolon had appeared immediately preceding the word "provided" contained in the second clause of subsection (b). Such change emphasizes the two independent clauses contained in the subsection and leaves little doubt that the proviso is intended to apply only to language immediately preceding the proviso and forming an independent clause.

In application of the rules of statutory construction referred to herein, you are advised that the "proviso" found in subsection (1), (b) of Section 363.260, RSMo 1959, as amended by Senate Bill No. 194, is intended to be a restriction applicable only to the second clause found in such subsection.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JLO'M:sr

July 8, 1963



Honorable Carroll J. Donohue  
Chairman, Board of Election  
Commissioners  
St. Louis County  
Clayton 5, Missouri

Dear Mr. Donohue:

You have requested on behalf of the Board of Election Commissioners of St. Louis County the opinion of this office with respect to the following:

The St. Louis County Council consists of seven members, each elected from a separate district. There is presently a need, if not a duty, to redistrict the council districts by reason of a disparity in population of the existing districts. Under the charter of St. Louis County, the authority to make changes in the boundaries of council districts is vested in the council itself. A member of the council, Honorable John O'Hara, has requested the Board of Election Commissioners to assist him in preparing a redistricting proposal to be submitted to the council for its consideration. The Board desires to know whether it has the right, power and authority under the law to render such advisory assistance.

The Board of Election Commissioners of St. Louis County is a bi-partisan body created by statute with four members all of whom must be "of approved integrity and capacity." The statutes impose numerous specific duties upon the Board including those relating to registering voters, conducting elections, and dividing townships into election precincts. Another mandatory duty imposed upon the Board both by the

July 8, 1963

Constitution and the statutes is to divide the county into magistrate districts of compact and contiguous territory, as nearly equal in population as may be. In the performance of all of its specific and mandatory duties, the Board necessarily has acquired valuable information and data available to it and to the public and which undoubtedly would be very helpful in the creation of council districts which comply with the requirements of the Charter.

The real question, as we see it, is whether the Board of Election Commissioners of St. Louis County has the right and power to make available to a council member in a meaningful manner the information and data at the disposal of the Board. We are, of course, aware of the salutary principle that public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted, but a careful study of the cases makes it clear that such principle has application to situations where the officer attempts to bind authoritatively or otherwise legally affect the rights of the public or individual members thereof. In cases of that kind, a strict construction of the law is necessary and desirable. No comparable situation is here involved.

In our view, when the exercise of the authority is undoubtedly in the public interest, as here, and cannot adversely affect the legal rights of any person, and where the statutes contain no prohibitory language, a liberal construction of the law should be adopted.

The information and data in question are in the possession of the Board of Election Commissioners and clearly are subject to public inspection and use. In aid of such right of the public, it is our opinion that the Board may properly assist the public, including a member of the council, in making use of such information and data. To hold otherwise would mean that no public officer would have the right to make himself available to inform or assist the public or any member thereof. It would equally follow otherwise that no clerk behind the counter in any public office would have any right to make any constructive suggestions or give helpful information to any member of the public.



July 8, 1963

CONCLUSION

We hold that the right, power and authority to make its information and data available in a meaningful manner and to render constructive suggestions with respect thereto, as here requested by Councilman O'Hara, may properly be exercised by the Board. Of course, in making its "know-how" available, the Board may not do so at a time or in a manner which would interfere with the performance of duties specifically imposed upon it by law.

Subject to such qualification, therefore, it is our opinion that the Board of Election Commissioners of St. Louis County has the right, power and authority, in its discretion, to give the requested advice and assistance in the preparation of a proposed council redistricting which will comply with the Charter requirement that the districts be "of contiguous territory as compact and nearly equal in population as practicable."

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JN:gn

OPINION REQUEST NO. 270  
ANSWERED BY LETTER

June 27, 1963



Honorable A. Basey Vanlandingham  
State Senator  
State Capitol  
Jefferson City, Missouri

Dear Senator Vanlandingham:

This refers to your letter of June 17, 1963, in which, pursuant to a letter addressed to you by Mr. Harry Gershenson, St. Louis, Missouri, dated June 13, 1963, you request an opinion concerning the question whether meetings of the board of aldermen of a fourth class city must be conducted within the limits of the city, and what the situation is if there is no available space in the city.

The Missouri statutes do not contain any provision stating where meetings of the board of aldermen of a fourth class city shall be held. Also, like Mr. Gershenson, we find no Missouri court decision on this subject or decisions in other states which are of any real assistance.

There is no prior opinion of this office dealing with this specific question; but, in an opinion furnished to Edward W. Garnholz on April 13, 1956, a copy of which is enclosed, it was concluded that the municipal court of an incorporated town or village must be held within the corporate limits of the town or village.

It is apparent from Mr. Gershenson's letter that he has substantial doubt concerning the validity of action taken at meetings held outside of the city in the case with which he is concerned. Undoubtedly, a board of aldermen or similar body, as a general proposition, should hold its meetings within the limits of its city; and we are unable to express with any assurance an opinion whether, or in what circumstances, action could be legally taken at meetings held elsewhere.

Honorable A. Basey Vanlandingham

We believe, however, that action taken at meetings held outside the city would not necessarily be held invalid in all circumstances. If the board of aldermen in a case such as that described by Mr. Gershenson should by unanimous action determine that there was no available meeting place within the city and establish a meeting place at a convenient location near the city where residents of the city and others having business with the board could readily attend the meetings, it is our thought that, considering the necessity and practical effect of holding meetings at the place so selected, a court probably would not hold that action taken at such meetings was void merely because the meetings were held outside of the city.

On the other hand, it is entirely possible that any member of the board could prevent the legal holding of meetings outside of the city by refusing to agree thereto. Moreover, the legality of meetings outside of the city at best would depend upon the facts of the particular cases; and it seems more likely that such action would be upheld as a temporary expedient than as a permanent arrangement. In this connection, it may be noted that the impossibility of holding meetings within a city probably would be debatable in almost any case and it is questionable whether there could be any necessity for that condition to continue indefinitely.

We regret that we cannot give you more definite and helpful advice, but it must be recognized that to hold meetings outside of the city limits does involve significant risks and that no opinion expressed by this office would have any effect upon the legal consequences of such action.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

JCB:oa  
Enc.

CORONERS  
DEAD BODIES  
PERSONAL PROPERTY  
MORGUES



As it relates to the Coroner of Jackson County, Sec. 58.260 spells out the scope of the coroner's authority in violence or casualty cases, excepting homicide and abortion cases. Sec. 58.451 spells out the somewhat broader scope of authority of the Coroner of Jackson County in homicide and abortion cases.

Sec. 58.240 does not apply to the City of Kansas City.

Temporary custody of property at the scene or on the body is to be taken by the sheriff or police, except in the limited case in which the coroner calls an inquest, in which event the coroner takes custody only of the property found on the body.

Opinion No. 271

August 23, 1963

Honorable Jasper M. Brancato, State Senator  
11th District, Jackson County  
601 West 12th Street  
Kansas City, Missouri

Dear Senator Brancato:

This is in answer to your opinion request dated, June 19, 1963.

Our study of your rather lengthy inquiry produces the following specific questions which we have paraphrased as follows:

- (1) What is the jurisdiction or authority of the Jackson County Coroner relative to the right to take charge of a dead body?
- (2) Whether or not Sec. 58.240, RSMo 1959 is applicable to Jackson County or the City of Kansas City?
- (3) Who is responsible for property found on or near dead bodies?

I

What is the jurisdiction or authority of the Jackson County Coroner relative to the right to take charge of a dead body?

Sec. 58.260, RSMo 1959, provides as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place, in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death." (Emphasis added.)

This statute applies to all coroners in the state, and, prior to the enactment of Sec. 58.451 in 1957, was the only statute applicable to Jackson County relative to the coroner's power and authority.

Sec. 58.260 does not impose the duty upon anyone to notify the coroner of the finding of a dead body. This was held in the case of State v. Stringer, 211 SW 2d 925, 930, in the following language:

"\* \* \* In the second place, the argument erroneously assumes that there was some legal duty on the general public and particularly upon the accused to report the child's death to the coroner. An examination of the statutes does not reveal any such general public duty. Mo.R.S.A. ss 9767, 13227-13268, 14839. The statute requiring the coroner to summon a jury 'so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty,' (Mo. R.S.A. s. 13231) does not necessarily impose any such specific duty upon an accused or, for that matter, upon the general public." (Emphasis added.)



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In analyzing the import of what is now Sec. 58.260, the Kansas City Court of Appeals in Patrick v. Employers Mutual Liability Insurance Co., 118 S.W. 2d 116, 122-123 made the following observations:

"Under the provisions of these sections it seems apparent that the coroner has no authority to perform an autopsy under the circumstances here present, or have one performed, except in connection with an inquest to be held before a coroner's jury." (Emphasis added.) at p. 122 of the opinion.

"In no place in the chapter is the coroner authorized to hold an autopsy under the circumstances here present except in connection with an inquest, to be held before a jury, of persons supposed to have come to their deaths by violence or casualty, the latter term including accidents." (Emphasis added.) at p. 122 of the opinion.

"In this state a coroner acts judicially in respect to determining whether an inquest shall be held." at p. 123 of the opinion.

Thus, although under Sec. 58.260 no one has an affirmative duty to report the finding of a dead body to the coroner, yet if the coroner in some fashion learns of a death caused by violence or casualty, he has reasonable discretion (which discretion should be expeditiously exercised) to order an inquest.

We note that nothing in Sec. 58.260 authorizes the coroner to take charge of the body.

Sec. 58.260, as we stated earlier, is the general statute applying to all coroners in the state.

We now turn to Sec. 58.451, RSMo 1959 which in certain types of violent deaths gives the coroner of Jackson County (and St. Louis County and St. Louis City as well) certain additional prerogatives which he did not possess under the pre-existing general statute.

Sec. 58.451 reads as follows:

"1. When any person in any city of seven hundred thousand or more inhabitants, or in any county of the first class, dies and there is reasonable ground to believe that such person died by criminal

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violence or following abortion, it shall be the duty of any person having knowledge of the death immediately to notify the coroner of the known facts concerning the time, place, manner, circumstances and cause of the death. Immediately upon receipt of the notification, the coroner shall go to the dead body and take charge of same. Upon taking charge of the dead body and before moving the same the coroner shall notify the police department, of any city in which the dead body is found, or if the dead body is found in the unincorporated area of a county governed by the provisions of sections 58.451 to 58.457, the coroner shall notify the county sheriff and county highway patrol and cause the body to remain unmoved until the police department, sheriff or county highway patrol has inspected the body and the surrounding circumstances and carefully notes the appearance, the condition and position of the body and records every fact and circumstance tending to show the cause and manner of death with the names and addresses of all known witnesses, and shall subscribe the same and make such record a part of his report.

"2. If on view of the dead body and after personal inquiry into the cause and manner of death, the coroner and police officials have reasonable ground to believe that the death was caused by criminal agency and that a further examination is necessary in the public interest, the coroner on his own authority may make or cause to be made an autopsy on the body. The coroner may on his own authority employ the services of a pathologist, chemist, or other expert to aid in the examination of the body or of substances supposed to have caused or contributed to death, and if the pathologist, chemist, or other expert is not already employed by the city or county for the discharge of such services he shall, upon

written authorization of the coroner, be allowed reasonable compensation, payable by the city or county, in the manner provided in section 58.530. The coroner shall, at the time of the autopsy, record or cause to be recorded each fact and circumstance tending to show the condition of the body and the cause and manner of death.

"3. If on view of the dead body and after personal inquiry into the cause and manner of death the coroner considers a further inquiry and examination necessary in the public interest, he shall make out his warrant directed to the sheriff of the city or county requiring him forthwith to summon six good and lawful citizens of the county to appear before the coroner, at the time and place expressed in the warrant, and to inquire how and by whom the deceased came to his death."  
(Emphasis added.)

The term "criminal violence" as used in this section we equate to the word "homicide." Thus, in homicide or abortion cases, duties evolve which are different from the responsibilities which existed under the aforementioned general statute.

First, in homicide and abortion cases, there is a duty imposed on the public and law enforcement officials to notify the coroner. See subsection 1 of Sec. 58.451.

Second, in homicide and abortion cases, the coroner takes charge of the dead body although he cannot remove the body from the scene until the police have completed their on-the-scene investigation. See subsection 1 of Sec. 58.451.

Third, in homicide and abortion cases, the coroner can perform an autopsy even without calling an inquest. See subsection 2 of Sec. 58.451. (Contrast this with the Patrick Case previously quoted wherein under the general statute, Sec. 58.260, the Kansas Court of Appeals ruled that a coroner could not perform an autopsy without calling an inquest.)

To summarize thus far, we have the following inter-relationship of old section 58.260 and new section 58.451, both of which sections apply in their limited spheres to the Coroner of Jackson County.

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Sec. 58.260 gives limited authority to the Jackson County Coroner in violent deaths of the non-homicide or non-abortion types (e.g., industrial deaths, automobile deaths, etc.). Sec. 58.451 specifically grants the somewhat broader authority as discussed previously to the Jackson County Coroner in homicide and abortion deaths.

It almost goes without saying that under either section, if there is the slightest possibility that the victim is still alive, there should not be a moment lost in getting the victim in the hands of competent medical authorities at a hospital, doctor's office, etc. Common sense and garden-variety decency dictate that the saving of a human life should not be jeopardized by a ghoulish, jurisdictional dispute over who takes charge of a body which as yet may not have become a corpse.

## II

Whether or not Sec. 58.240, RSMo 1959, is applicable to Jackson County or the City of Kansas City?

Sec. 58.240, RSMo 1959 reads as follows:

"Any city in this state now or hereafter having five hundred thousand inhabitants or more is authorized and empowered to provide by ordinance that the morgue or mortuary as established by such city shall be under the control and management of the coroner of such city."

The 1960 census of Kansas City was 475,539. Therefore, this section obviously does not apply to Kansas City.

## III

Who is responsible for property found on or near dead bodies?

This inquiry relates to the respective duties of coroners, sheriffs and police concerning property found on or near dead bodies.

In *Adey v. Adey*, 58 Mo. App. 408, 409-410, the St. Louis Court of Appeals stated the rule with respect to descent of personal property in the following language:

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"It is the established law of this state that on the death of the owner, personal property descends to his or her personal representative \* \* \*"

See also *Eisiminger v. Stanton*, 107 S.W. 46.

This is likewise the rule of the recent probate code, as expressed in Sec. 473.260 and Sec. 473.263, RSMo 1959. Therefore, while it is the established law of this state that personal property go directly and immediately to the personal representatives of the deceased (executors, administrators, or widows, etc.), there still remains the problem of temporary custody of personal property found at the scene or on or near a dead body.

At common law and traditionally under the law of this state, the sheriff and the local police are the conservators of the peace. As such, they have the duty not only to arrest those who have violated the law, but also to protect the lives and property of the citizens. This is not only traditional, it is likewise confirmed in our statutes. See Sec. 57.110, RSMo 1959, relating to sheriffs, and Sec. 84.420, RSMo 1959, relating to Kansas City police.

It is therefore our opinion that the sheriff or police, as the case may be, would have the duty to protect the property of a deceased person during the interim period between the discovery of the deceased and the take over of personal property by the deceased's personal representatives.

There is, however, one definite exception to this rule. This is the situation presented by Sec. 58.490, RSMo 1959. This section provides as follows:

"The coroner, within thirty days after an inquest, upon a dead body, shall deliver to the county or city treasurer any money or other property that may be found upon the body, unless claimed in the meantime by the legal representatives of the deceased. If he fails to do so, the treasurer may proceed against him for its recovery by a civil action in the name of the state for the use of the county or city." (Emphasis added.)



Honorable Jasper M. Brancato - 8. August 23, 1963

The primary purpose of this section manifestly is to direct the coroner with respect to the disposition of money or property which he finds upon a dead body, but only in those cases where the coroner holds an inquest.

While this statute does not in express terms place any duty upon the coroner to take charge of property found on a dead body, we think it is fairly implied that the coroner has the duty to take charge of property found on a dead body, if and only if, the coroner calls an inquest. In the event the coroner does not call an inquest, then manifestly this statute confers no duty or obligation upon the coroner respecting temporary custody of such property.

Practical application of this statute would appear to operate somewhat in the following manner.

When the coroner receives notice or information concerning a dead body within the orbit of his authority, as spelled out in Secs. 58.260 or 58.451, it is contemplated that the coroner will make an expeditious decision as to whether or not he will hold an inquest.

If the coroner decides to hold an inquest, then Sec. 58.490 applies and property found upon the dead body may be retained in the temporary custody of the coroner for later delivery to the personal representatives of the deceased.

If the coroner decides not to have an inquest, then the sheriff or police, as conservators of the peace, would be charged with the duty of retaining temporary custody of all the property upon the dead body as well as the property apparently belonging to the deceased near or around the dead body. Of course, this does not mean that the property necessarily need to be removed from the place where same is located, provided adequate safeguards are taken to preserve the property pending its being claimed by the deceased's personal representative.

Honorable Jasper M. Brancato - 9. August 23, 1963

CONCLUSION

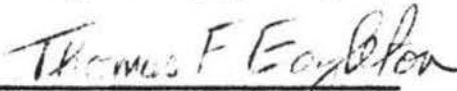
(1) As it relates to the Coroner of Jackson County, Sec. 58.260 spells out the scope of the coroner's authority in violence or casualty cases, excepting homicide and abortion cases. Sec. 58.451 spells out the somewhat broader scope of authority of the Coroner of Jackson County in homicide and abortion cases.

(2) Sec. 58.240 does not apply to the City of Kansas City.

(3) Temporary custody of property at the scene or on the body is to be taken by the sheriff or police, except in the limited case in which the coroner calls an inquest, in which event the coroner takes custody only of the property found on the body.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Very truly yours,

  
THOMAS F. EAGLETON  
Attorney General

September 5, 1963



Honorable Lewis B. Hoff  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Mr. Hoff:

This refers to your letter of June 19, 1963, relating to the receipt of compensation by the probate judge and ex officio magistrate of your county for service performed by him as a member of the municipal band of the City of El Dorado Springs, Missouri.

You inquire whether his receipt of compensation for such services would be in violation of the provisions of Section 482.030, RSMo 1959, which prohibit any magistrate from receiving "any other or additional compensation for any other public service." A like prohibition, applicable to all judges and magistrates, is contained in Article V, Section 24, Constitution of Missouri.

You state that the municipal band in El Dorado Springs is supported by tax money pursuant to Sections 71.6<sup>40</sup> to 71.670, RSMo 1959, under which certain municipalities may have a special tax levy to create a "band fund."

Under Section 71.670, no money may be disbursed from the fund so created except pursuant to a written contract entered into by the municipality with the authorized officials of a band for the employment of the band to perform certain services. That section further provides that the band shall administer its own financial and business affairs.

In view of these statutory provisions concerning the relationship between a municipality and its municipal band and the disbursement of money from a municipality's

Honorable Lewis B. Hoff

"band fund," it is our view that the receipt of compensation by a person for services performed by him as a member of a municipal band does not constitute receipt of compensation for public service, within the meaning of the provisions of Section 482.030, RSMo 1959, and Article V, Section 24, Constitution of Missouri, mentioned above.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

By John C. Baumann  
Assistant Attorney General

JCB:df

MAGISTRATES:  
DEPUTIES:  
COMPENSATION:  
COUNTIES:  
COUNTY COURTS:

Where a magistrate whose office is created by order of the circuit court appoints a deputy clerk or other employee and fixes the salary within statutory limits, county court must pay such salary and may not reduce it.

Opinion No. 275

August 7, 1963



Honorable James G. Lauderdale  
Prosecuting Attorney  
Lafayette County  
Courthouse  
Lexington, Missouri

Dear Mr. Lauderdale:

This is in response to your recent request for an opinion of this office, which request reads as follows:

"Sec. 483.485 R. S. 1959 provides among other things: In all counties each Magistrate shall by order duly made and entered of record appoint and fix the salary of a Clerk of his Court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his Court and fix their salaries at such sum as in his discretion may seem proper. That in any county where the need exists, the County Court is hereby authorized, at the cost of the county, to provide such additional Clerks, deputy Clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of Clerks, deputy Clerks and other employees, in addition to the amounts payable by the state under this section. All such Clerks, deputies and employees shall serve at the pleasure of the Magistrate.

Sec. 483.490 R. S. 1959, provides among other things: The salaries of Clerks, deputy Clerks and employees of additional Magistrates whose offices are created by order of the Circuit Court as provided in



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section 482.010 R. S. Mo. shall be paid by the county as salaries of such Magistrates are required to be paid. The salaries of such Clerks, deputy Clerks, and employees shall be fixed by the Magistrate, or Magistrate Court if the Magistrates are organized into a Court with divisions.

The Magistrate Court of Lafayette County, Missouri, is an additional Magistrate Court created in 1947 by an order of the Circuit Court. This Court has one full time Clerk and one additional employee doing stenographic work, filing etc. both of whom have been appointed, and their salaries fixed by an order of the Magistrate duly entered and a copy of each filed with the Clerk of the County Court. The County Court has been reluctant to pay the salary of the additional employee for a full twelve months of the year but only part time. The Magistrate has shown a need for full time employment of the additional employee.

The Magistrate having complied with the statutes in making the appointment, fixing the salary and filing a copy with the Clerk of the County Court, is it mandatory that the County Court authorize the payment of this salary while the additional employee is working at the pleasure of the Magistrate, or, does the County Court have a discretionary power whereby they can refuse to acknowledge the appointment of the Magistrate and to refuse to pay the salary as fixed by order of the Magistrate.

The regular full time Clerk of this Court now receives \$290.00 per month salary and the additional employee receives \$175.00 per month salary."

As it applies to Lafayette County which has a population as shown by the 1960 census of 25,274, Section 483.490, Cum. Supp. 1961, reads as follows:

"1. Salaries of clerks, deputy clerks and employees provided for in section 483.485 shall be paid by the state

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within the limits herein provided upon requisition filed by the judges of the magistrate courts; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in section 482.-010, RSMo, shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

\* \* \* \* \*

"(6) In all counties now or hereafter having a population of more than fifteen thousand inhabitants but not more than thirty thousand inhabitants, with an assessed valuation of more than twenty-four million dollars, the sum of four thousand four hundred dollars, provided, that in all such counties in which the probate court is required by law to be held in more than one place such salaries shall not exceed the sum of six thousand nine hundred dollars:

\* \* \* \* \*

"2. The salaries of such clerks, deputy clerks and employees shall be fixed by the magistrate, or magistrate court if the magistrates are organized into a court with divisions. When the judge of the probate court is also judge of the magistrate court, such judge, in his discretion, may designate one or more of such clerks, deputy clerks, or employees as clerks, deputies or employees in the probate court."

In view of the very clear provisions of subparagraph 2, supra, to the effect that the salaries of "clerks, deputy clerks and employees shall be fixed by the magistrate, or

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magistrate court if the magistrates are organized into a court with divisions . . . , we believe that there is no room for the exercise of discretion on the part of the county court as to whether the deputy involved here is to be paid or as to how much the deputy is to be paid, as long as the salary is within statutory limits.

This view is fortified by the first sentence of Section 483.485, RSMo 1959, which reads as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper."

Thus, we are of the opinion that the compensation of a deputy clerk or other employee appointed by a magistrate is set by the magistrate and not by the county court (regardless of whether the appointing magistrate is one whose office is created by order of the circuit court or by the provisions of subsection 2, Section 482.010, R.S.Mo. 1959).

It is true that under other provisions of Section 483.485, R.S.Mo. 1959, the county court, where it finds such a need exists, "is authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state . . . ." As to such clerks and employees, the county court may choose to provide them to the magistrate or not to provide them. Likewise, the compensation of such clerks and employees is a matter within the control of the county court.

However, a distinction must be drawn between clerks and employees provided by the county court and those appointed by a magistrate. As pointed out above, the

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salary of the latter class is set by the magistrate. The salaries of clerks, deputies, and employees of a "statutory" magistrate (i.e., one whose office is created by subsection 2, Section 482.010 R.S.No. 1959) are derived from state funds. Salaries for clerks, deputies, and employees appointed by an "additional" magistrate (i.e., one whose office is created by order of the circuit court) are paid from county funds. Subsection 1, Section 483.490, supra.

CONCLUSION

It is, therefore, the opinion of this office that where a magistrate, whose office is created by order of the circuit court, appoints a deputy clerk, (or other employee) and fixes his salary within statutory limits, it becomes a ministerial function of the county court to pay such salary. The county court may exercise no discretion as to whether such salary shall be paid nor may the county court reduce the amount of the salary.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

SHERIFFS:  
VACANCIES:  
ELECTIONS:  
QUO WARRANTO:  
REMOVAL FROM OFFICE:

Sheriff removed from office by quo warranto proceedings not eligible to be candidate for election to fill vacancy caused by such ouster.

June 25, 1963

OPINION NO. 276

Honorable Fred Stutler  
Representative, Sullivan County  
Capitol Building, Room 413  
Jefferson City, Missouri



Dear Representative Stutler:

This is in answer to your recent request for an opinion reading as follows:

"Mr. Everett Vannorsdel was ousted from the office of sheriff of Sullivan County by the Circuit Court of such County on June 13, 1963. The County Court of such County has in compliance with the decisions of Section 57.080, RSMo 1959, ordered a special election to fill the vacancy caused by such ouster. Is Mr. Everett Vannorsdel eligible to become a candidate for the office of sheriff at such special election?"

The judgment and decree of the Circuit Court of Sullivan County in the case of State of Missouri at the information of M. E. Montgomery v. Everett Vannorsdel provides in part as follows:

"WHEREUPON it is considered and adjudged by the court that the said Respondent, Everett Vannorsdel do not in any manner intermeddle with or concern himself in or about the rights, liberties, privileges, and franchises of the office of Sheriff of Sullivan County, Missouri, aforesaid, but that he be absolutely prohibited and excluded from exercising or using the same or any of them for the future, \* \* \*."



Honorable Fred Stutler

Such judgment specifically ousted Mr. Vannorsdel from the office of Sheriff of Sullivan County, Missouri, and specifically provided that he is prohibited and excluded from exercising or using the privileges and franchises of the office of Sheriff in Sullivan County.

In the case of State on Inf. McKittrick v. Wymore, 132 SW2d 979, the Supreme Court stated that the character of judgment in quo warranto cases is largely within the discretion of the court entering such judgment. In such case an information in quo warranto was filed against the Prosecuting Attorney of Cole County by the Attorney General of Missouri. The Supreme Court in its judgment ousted the Prosecuting Attorney from the office of Prosecuting Attorney of Cole County until the end of his first term of office. The Court said, l.c. 988:

"\* \* \* He is ousted from the office of prosecuting attorney as of Aug. 24, 1937, and until the end of his first term. \* \* \*"

In the case of State on Inf. of McKittrick v. Graves, 144 SW2d 91, the Supreme Court entered a judgment ousting the Prosecuting Attorney of Jackson County from the office of Prosecuting Attorney of Jackson County until the end of his term of office. The Court said, l.c. 98:

"\* \* \* He should therefore be ousted from the office of prosecuting attorney of Jackson county as of May 10, 1939, and until the end of his present term of office. \* \* \*"

It is clear from the judgments entered in the Wymore and Graves cases that a judgment in quo warranto ousting an incumbent from the office can also provide that his ouster is effective during the remainder of his term of office. There is no doubt that the judgment of the Circuit Court of Sullivan County ousting Mr. Vannorsdel does provide that he is prohibited and excluded from exercising the franchise from the office of Sheriff of Sullivan County in the future. Therefore, under the provisions of such judgment, Mr. Vannorsdel being prohibited from serving as sheriff of Sullivan County is ineligible to become a candidate for such office, at such special election.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

August 7, 1963



Honorable Don F. Whitcraft  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri

Dear Mr. Whitcraft:

This is in response to your recent request for an opinion of this office as to whether peace officers in various towns within your county may receive mileage fees from the county when they are assisting your sheriff in the performance of his duties.

In a recent opinion request answered by letter of advice, we held that Section 57.250, R.S.Mo. 1959, provided the exclusive method of effecting reimbursement of those who assist a sheriff in a county of the third or fourth class in the performance of his duties. That is to say, the men referred to in your letter may be appointed deputy sheriffs by the procedure outlined in Section 57.250. (See letter of advice to Robert P. C. Wilson, I.I., dated December 21, 1962, which is attached herewith.) Such an appointment would then qualify the men for compensation as deputies as well as the mileage fees provided for in Section 57.430, Cum. Supp. 1961.

For the sake of completeness, one additional aspect of the problem should be considered: that of incompatibility between the offices presently held and the status of deputy sheriff. Our research fails to reveal any statutory prohibition against such a dual status; and, although we do not have access to the city ordinances which create the positions now held, it seems unlikely that any incompatibility will arise in fact or practice. However, this is an area which you may consider in formulating your advice to the county court.

Honorable Don F. Whitcraft

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August 7, 1963

To assist you in this regard we are forwarding herewith copies of two opinions issued by this office on the subject of compatibility of offices.

We trust that the foregoing adequately disposes of your question.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

Encs. Opinion, January 16, 1941, to  
Mr. Fred Keller, Sheriff

Opinion, November 17, 1950, to  
Honorable G. Logan Marr

Letter, December 21, 1962, to  
Robert P. C. Wilson, III

August 26, 1963



OPINION NO. 279  
ANSWERED BY LETTER (Chitwood)

Honorable Edwin W. Mills  
Prosecuting Attorney  
St. Clair County  
P. O. Box 151  
Osceola, Missouri

Dear Mr. Mills:

This office is in receipt of your request for our legal opinion as to whether one who is a qualified surveyor, residing in a Missouri county, can be a candidate and legally elected county surveyor in a Missouri county other than the one of his residence.

In an opinion of this office written for Honorable Albert D. Nipper, Prosecuting Attorney of Washington County, Missouri, on May 25, 1949, it was concluded that a vacancy caused by the failure of the person elected to the office of county surveyor to qualify, should be filled by appointment of the Governor, and the appointee need not be a resident of the county for which he is appointed, the only residence requirement being residence in this State for one year next preceeding the appointment. This matter was fully discussed on page two of the opinion, and refers to Section 13190, RSMo 1939, on the requirements of the office of county surveyor (now Section 60.010, RSMo 1959).

In view of the fact that residence in the county is not one of the statutory requirements for appointment or election to the office of county surveyor where the vacancy exists, it is believed that the above mentioned opinion answers your inquiry in the affirmative and a copy of same is enclosed for your consideration.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

PNC:jh  
Enc.

July 18, 1963



Honorable Ronald Belt  
Republican Floor Leader  
517 Kohn Street  
Macon, Missouri

Dear Mr. Belt:

We have your letter of June 27, 1963, wherein you refer to us an inquiry from a third class city relating to House Bill No. 250.

This bill amends Section 77.040, RSMo 1959, which provides for a general election of the elective officers of cities of the third class not under an alternative form of government. Section 77.040 was changed by adding the clause:

"\* \* \* except that the city council may by ordinance provide for the nomination of officers by primary election under the provisions of sections 78.470 to 78.510, RSMo; \* \* \*."

Your question is whether the city council of a third class city could validly enact the necessary ordinances prior to the effective date of the bill.

Section 29, Article III, Constitution of Missouri, 1945, provides that no law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted unless it is an appropriation act or in case of an emergency. House Bill No. 250 is not an appropriation bill nor does it carry an emergency clause. Therefore, its effective date is October 13, 1963--ninety days after the adjournment of the Legislature on July 15, 1963. Until such date there is no existing statute authorizing the passage of ordinances providing for primary elections of elected officers of cities of the third class not under an alternative form of government.



Honorable Ronald Belt

Enclosed herewith are two opinions of this office, one issued on February 1, 1936, to the Honorable F. D. Wilkins, City Attorney, 305½ Wilkins Building, Louisiana, Missouri; the other issued on May 13, 1942, to the Honorable John O. Bond, City Attorney, 510 Central Trust Building, Jefferson City, Missouri. The gist of these opinions is that in the absence of enabling legislation by the State of Missouri, cities of the third class cannot by ordinance provide for municipal primary elections of city officers.

It is, therefore, our opinion that the city council of any third class city coming under the provisions of Chapter 77 should not attempt to enact ordinances for the nomination of officers by primary election as provided by House Bill No. 250 until after October 13, 1963.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JHD:lt  
Enclosures

LICENSES: Baker Employment Agency, Danville, Illinois,  
EMPLOYMENT AGENCIES: is not required to secure a license as such  
from the State Division of Industrial  
Inspection.

Opinion No. 281

October 2, 1963



Mr. Don L. Cummings, Director  
Division of Industrial Inspection  
Department of Labor and Industrial Relations  
Jefferson City, Missouri

Dear Mr. Cummings:

In your letter of June 28, 1963, you request an opinion  
from this office as follows:

"Enclosed herewith you will please find a  
copy of correspondence that I have had  
with the Baker Employment Agency who main-  
tains an office in Danville, Illinois.

"As you will note I have indicated that I  
am of the opinion that Mr. Baker should  
obtain a license in the State of Missouri  
if he wishes to advertise as an employment  
agency in the newspapers of our state.

"Mr. Baker has, however, raised some perti-  
nent questions concerning this matter, and  
as a result, I would like to respectfully  
request that you give us a ruling as to  
whether, in your opinion, the Baker Employ-  
ment Agency should be licensed as a private  
employment agency in the State of Missouri."

You submitted correspondence with T. A. Baker of the Baker  
Employment Agency, Danville, Illinois. From these letters, it  
appears that Mr. T. A. Baker is the owner of the Baker Employ-  
ment Agency. According to the information gained from these

Mr. Don L. Cummings, Director    - 2 -

letters, the Baker Employment Agency maintains an office in Danville, Illinois, where all interviews with applicants for employment occur. Mr. Baker or the Baker Employment Agency does not have any office in Missouri. He does advertise in newspapers in Missouri as an employment agency located in Danville, Illinois. There is nothing to indicate that Mr. Baker transacts any business in Missouri other than advertising in the papers.

Section 289.010, RSMo 1959, provides in part:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the director of the division of industrial inspection of the state department of labor and industrial relations. \* \* \* Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. The license, together with a copy of sections 289.010 to 289.040, shall be posted in a conspicuous place in each and every employment agency. \* \* \*"

[Emphasis supplied.]

The general rule to be applied in construing license statutes is stated in 53 C.J.S., Licenses, paragraph 12, page 495, as follows:

"Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizen and strictly against the government, whether state or municipal, especially where they provide penalties for their violation."

In *National Exhibition Company v. City of St. Louis*, 136 SW2d 396, the St. Louis Court of Appeals, in discussing how licensing ordinances should be construed, stated, l. c. 401:

"The general rule with respect to the imposition of license fees is stated in 62 C.J. 852, as follows: 'Ordinances imposing license fees, being in derogation of the common law, are to be strictly construed in favor of the person against whom they are sought to be applied.'"

Section 289.010, supra, is a licensing statute which requires the payment of a fee and provides a penalty for its violation. It should be strictly construed against the state.

Section 289.010, supra, provides in part that no person, firm or corporation in this state shall "open, operate or maintain an employment office or agency for hire" where a fee is charged for such service without first obtaining a license. The words "in this state" limit the operation of this statute to the employment agency business which has an office or place of business in Missouri. The provision of the statute requiring the license to state the location of the employment agency is relevant to and indicates the same conclusion. The words "maintains an office or agency" require the location of an office or place of business in the state. The clear intent of Section 289.010 requires an employment agency to have an office or place of business in Missouri. A person or corporation that advertises in newspapers, magazines or other periodicals that are either published or circulated in this state can not be considered as operating or maintaining an "office or agency" in the state when all the business in connection therewith, other than the advertising and correspondence, is transacted outside of the state.

#### CONCLUSION

It is the opinion of this office that a person, firm or corporation who advertises in the newspapers of this state as an employment agency, but does not maintain or operate an office in this state, and who does not conduct any of the business in connection therewith in this state, other than by correspondence, is not required to secure a license under the provisions of Chapter 289, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

INSURANCE: Articles of Incorporation of Family Security Life Insurance Company.

OPINION NO. 282

July 17, 1963



Honorable Jack L. Clay  
Superintendent, Division of  
Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Clay:

Receipt is acknowledged of your letter of June 27, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Family Security Life Insurance Company, which Declaration of Intention also included a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JLO:df



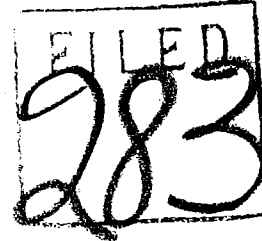
COUNTY COLLECTOR:  
TRAVEL EXPENSES:  
MILEAGE:

Collector of county of second class may receive reimbursement from county court for reasonable travel expenses actually and necessarily incurred in carrying out the official duties imposed by Sections 139.080 and 150.110, RSMo 1959.

OPINION NO. 283

September 10, 1963

Honorable Brunson Hollingsworth  
Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri



Dear Mr. Hollingsworth:

This is in response to your request for an opinion dated June 27, 1963, as follows:

"Would you please furnish our County Collector, Earl Toulouse, with an Opinion as to whether or not he is entitled to receive mileage.

"The enclosed constitutes his request to me."

"Situation: Traveling expense for the Collector of Revenue in a second class county on a yearly budget

"In the County of Jefferson, the Collector of Revenue is faced with a problem of added expense for travel to conduct his office properly. This added expense of the Collector is paid personally, which benefits both County and State.

"Section 139.080: The Collector has a problem of division of property. It is impossible for the Collector to arrive at a reasonable figure without first inspecting the property in question. This involves a considerable amount of travel throughout the County three to four times a month and even more in heavy tax collection.

Honorable Brunson Hollingsworth

"Section 150.110: The Collector travels considerably because of the number of businesses throughout the County which continue to go in and out of business."

The general rule relating to the propriety of a public officer receiving compensation was stated in *Nodaway County v. Kidder*, 129 SW2d 857, 1.c. 860 (Mo. 1939):

"It is well established that a public officer claiming compensation for official duties performed must point out a statute authorizing such payment."  
[Cases cited there]

I find no statutory authority allowing a collector of a second class county specifically or all public officers of a second class county generally to receive mileage. There is a general statute, Section 49.275, RSMo 1959, providing for mileage to public officers of first class counties but it does not apply to second class counties.

If it were the opinion of this office that mileage was compensation then the rule stated above would apply and no mileage would be allowed as no statute existed granting it to a county collector of a second class county. But, this office had held in several opinions, the most recent of which was addressed to Honorable J. R. Fritz, under date of October 24, 1961, that a reasonable allowance for mileage as a reimbursement for necessary expenses actually incurred in the performance of his official duties was not compensation to an officer. Hence, the rule requiring existence of a statute in order to claim compensation does not apply as mileage for expenses actually incurred is not compensation.

The Supreme Court has not spoken out on this particular matter of allowing mileage to a county collector for expenses actually incurred in the performance of his duties, but in two cases, *Rinehart v. Howell County*, 153 SW2d 381 (Mo. 1949), and *Bradford v. Phelps County*, 210 SW2d 996 (Mo. 1948), the court held that a county prosecuting attorney was entitled to reimbursement from the county court for the expense of necessitous stenographic service, where no statute existed providing for the service nor reimbursing for the outlay. The court distinguished the outlays from income and held in the *Rinehart* case at page 383, that the "... statutes relating to fees,

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to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'"

The court further held that even though a statute provided stenographic services to prosecutors in larger counties, this did not constitute *expressio unius est exclusio alterius* as to the prosecutors in smaller counties, but rather constituted legislative recognition of the propriety of expenditures for stenographic assistance. The court stated in the Rinehart case at p. 383:

"Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities . . ."

These cases were the basis for two opinions of this office which held that prosecuting attorneys may be reimbursed for actual and necessary traveling expenses incurred in the investigation of crimes. Attorney General's opinions to Honorable James L. Paul, January 23, 1941, and Honorable R. M. Gifford, August 7, 1951, are enclosed.

The statutory situation considered in the opinions regarding travel expenses was the same as to stenographic services, i.e., there were no statutes providing for travel expenses to prosecuting attorneys of the class county involved but statutes did provide for expenses to prosecutors in larger counties. The opinions inferred from the language of Rinehart and Bradford that the courts would view the situation regarding travel expenses in the same manner as stenographic service, i.e., hold that statutes and strict statutory construction necessary for compensation did not relate to outgo and that statutes expressly providing travel expenses for larger counties, rather than excluding it for smaller counties, were

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a showing of legislative recognition of the necessity and validity of such expense, hence the opinions held that the prosecuting attorney may be reimbursed by the county court for actual and necessary traveling expenses incurred in "the necessary fulfillment of the duties of his office."

It is not unreasonable, then, to infer from the cases and opinions of this office that a collector of a second class county may recover actual and necessary travel expenses incurred in the fulfillment of his statutory duties imposed by Sections 139.080 and 150.110, RSMo 1959.

As reimbursement of travel expenses is not compensation, the prohibition on compensation other than the salary provided by Section 52.420 RSMo 1959, is not effective to bar such reimbursement. Further, Section 49.275, RSMo 1959, which provides for travel expenses to county officials of first class counties "reasonably necessary to the efficient performance of his official duties," as the cases indicate, is not to be read as *expressio unius est exclusio alterius*, but rather as indicative of a legislative recognition of the necessity of such provisions to facilitate the expedient and efficient carrying out of official duties.

#### Conclusion

It is the opinion of this office that a collector of a second class county may receive from the county court reimbursement for reasonable travel expenses actually and necessarily incurred in the carrying out of the official duties imposed by Sections 139.080 and 150.110, RSMo 1959.

The foregoing opinion which I hereby approve was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

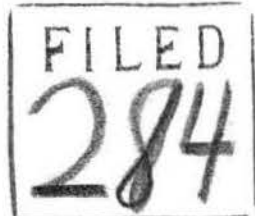
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SCHOOLS: (1) When a vacancy occurs on the board  
SCHOOL DISTRICTS: of a six-director school board, a quorum  
QUORUM: of at least four members is necessary to  
SCHOOL BOARDS: fill the vacancy.  
VACANCIES: (2) When two members of the board ab-  
sented themselves for the purpose of  
preventing a quorum during the course  
of the meeting, the vacancy was legally  
filled by three members who remained.

October 14, 1963

OPINION NO. 284

Honorable Lawrence F. Gepford  
Prosecuting Attorney  
Jackson County  
415 East Twelfth Street  
Kansas City 6, Missouri



Dear Mr. Gepford:

This is in answer to your letter of July 1, 1963, in which you request an opinion of this office, and which letter reads in part as follows:

"The facts presented to this office are as follows: Prior to April 24, 1963, the Board of Education of the Center School District No. 58 consisted of six members namely Messrs. Kenneth C. West, President, James I. Lanoue, Vice President and George M. Ryder, George W. Lehman, John J. McGovern and Faivel Dunn, Members. Under date of April 17, 1963 a notice was sent to all board Members of a special meeting on Wednesday, April 24th. Under date of April 22, 1963, an additional notice was sent out advising that in addition to the agenda mentioned in the previous notice, the board will consider filling a vacancy on the board and the selection of a new vice president. On Wednesday, April 24, 1963, all six members of the Board of Education were present for the special meeting. Each member of the board was provided with an agenda with Item No. 4 on the agenda being Vacancy - Board. A. Appointment, B. Oath of Office, C. Election of Vice President. All items of business were taken care of at the meeting as appear on the agenda, down to Item 4. When this item was reached, the minutes indicate that James I. Lanoue submitted his resignation and on motion duly made and seconded the resignation was



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accepted. The chair then declared in order suggestions for a replacement. A motion was made submitting the name of Arnold Shamberg as a replacement for James I. Lanoue. This motion was seconded. Thereupon Messrs. McGovern and Dunn advised that they were not in a position to vote on the replacement at this particular meeting and promptly left the meeting. After these two had gone the three remaining members, Messrs. West, Ryder and Lehman voted affirmatively for Mr. Shamberg and following this he was sworn in as a member of the board. A question has been raised by Messrs. McGovern and Dunn as to the legality of the proceedings.

"We are advised that you have been presented with a memorandum brief by Mr. Clarence Dicus, Attorney for the School Board. We enclose herewith a legal memorandum prepared by ourselves together with copies of the notices that were sent and a copy of the agenda for the meeting, and also the administrative handbook published by the Board of Education of Center School District and we call your attention particularly to Page 24 under the hearing Procedure. The basic question of course is, 1. Whether the three members who voted in favor of Mr. Shamberg as a replacement constituted a quorum for the conduct of business and, 2. Whether the withdrawal from the meeting by Messrs. McGovern and Dunn reduced the quorum previously existing. We would appreciate your opinion and advice in this matter at the earliest possible date."

We first point out that the problem involved does not deal with the number necessary to constitute a majority vote. It is evident that upon the resignation of one member of a six-director school board there are five remaining members and a majority of the five remaining members would be three. Section 1.050, RSMo 1959, is authority for a vote by this majority of three of the five remaining members to constitute valid action, provided a quorum was present. Therefore we

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are not concerned with the number of votes necessary. Rather, our problem is limited to the question of what constitutes a quorum, and our opinion is directed to the questions as you have phrased them, as follows:

1. Whether the three members who voted in favor of Mr. Shanberg as a replacement constituted a quorum for the conduct of business; and
2. Whether the withdrawal from the meeting by Messrs. McGovern and Dunn reduced the quorum previously existing.

In determining the number necessary to constitute a quorum, we first refer to the following statutes:

Section 165.317, RSMo 1959, provides as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

This section refers us to Section 165.217, which originally applied only to common school districts composed of three members, and which reads as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall,



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upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 165.210, and shall serve until the next annual school meeting."

With regard to a quorum for the transaction of business in a six-director district, Section 165.320 reads in part as follows:

" . . . A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. . . ."

From the phraseology of Section 165.217, which states that "the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy," it could be argued that the filling of a vacancy does not constitute the transaction of any official business and it could be argued that all five of the remaining directors must be present at a meeting in order for the remaining directors to validly make an appointment to fill a vacancy. Such a construction was placed on similar language in Pennsylvania, as shown by the case of Commonwealth vs. Kaiserman, 199 A. 143, 330 Pa. 196, where the court, at 1, c. 199 A. 144, said:

"Section 214 provides that, where there is a vacancy, the remaining members of the board shall, by majority vote thereof, fill such vacancy. 'Remaining members' means all members in office when the vacancies occur, and action by less than that number is not the action of the remaining members. \* \* \*"

However, the Pennsylvania court applied a strict construction to the Pennsylvania statute in question. We do not believe such a strict construction should be applied to the Missouri statutes under consideration, for the Missouri courts in the case of State ex inf. v. Bird, 296 Mo. 344, at 1, c. 352, said:

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"This court has held, however, in construing the intent and purpose of school laws that they were designed as a workable method to be employed by plain, honest and worthy citizens, not especially learned in the law; and that no strict and technical construction should be given to them."

We must, therefore, construe and interpret the Missouri statutes under consideration to determine their intent and purpose in the light of the language of the Missouri Supreme Court in the case of State vs. Bird.

You enclosed with your opinion request a copy of the Administrative Handbook published by the Board of Education of Center School District No. 58. On page 24 of the handbook the following appears:

## "II. PROCEDURE

### A. Quorum and Majority

1. A quorum shall consist of four members of the board meeting at the designated time and place.
2. 'No contract shall be let, teacher employed, bill approved, or warrant ordered unless a majority of the whole board shall vote therefor.' Sec. 165.320, Missouri School Laws, 1960, p. 115."

This excerpt from the Administrative Handbook shows that the Board of Directors of the Center School District have interpreted a quorum to be four members of the board. Such an interpretation is a "workable method \* \* \* employed by plain, honest and worthy citizens" and should be given consideration in determining the number necessary to constitute a quorum.

Likewise, the State Department of Education has recognized that the number necessary to constitute a quorum should be four members of a six-director district, as indicated by the annotations following Section 165.320, which appear in the 1960 edition of the Missouri School Laws compiled and published by the State Department of Education. This shows a construction and interpretation of long standing of the statutes under



Honorable ~~Lawrence F. Coffey~~

consideration here requiring that four members of the board of a six-director school district be present to constitute a quorum.

An opinion of this office was issued on September 27, 1934, to Honorable Charles A. Lee, State Superintendent, Department of Public Schools, Jefferson City, Missouri, and an opinion of this office was issued on January 4, 1937, to Honorable Donald B. Dawson, Prosecuting Attorney, Bates County, Missouri. Both of these opinions held that in a six-director school district it was necessary to have four members present to constitute a quorum. Again this shows an interpretation of long standing of the statutes under consideration and requires that four members of the board must be present to constitute a quorum.

It may be that the confusion concerning the number necessary to constitute a quorum has arisen from the necessity of applying Section 165.217 (which was originally intended to apply only to three-director school districts) to six-director districts. In determining the intention of the Legislature it is well to point out that Section 165.217 requires that should there be more than one vacancy at any one time, the county superintendent of schools is to make the appointment and fill the vacancy. If there were more than one vacancy in a three-director district there would not be a majority of the directors remaining and it is therefore reasonable to say that the Legislature intended that a majority of the whole board is necessary to fill a vacancy. When this proposition is then applied to a six-director district the conclusion would follow that the Legislature intended that at least four members, or a majority of the whole board, in a six-director district be present to fill a vacancy on the board of directors.

That such was the intent of the Legislature is indicated by Senate Bill No. 3, which was passed by the 72nd General Assembly and which will become effective on July 1, 1965. Senate Bill No. 3 is a revision of all of the school laws. Section 165.217 is carried forward in the revision by Section 3-80 of Senate Bill No. 3 without any substantial change. However, in its application to six-director districts the revision of the school laws has made a significant change in Section 3-26 of Senate Bill No. 3 of the 72nd General Assembly. That section reads as follows:



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"The government and control of a six-director school district, other than an urban district, is vested in a board of education of six members, who hold their office for three years, except as provided in section 3-24, and until their successors are duly elected and qualified. Any vacancy occurring in the board shall be filled by the remaining members of the board; except that if there are more than two vacancies at any one time, the county superintendent of public schools, upon receiving written notice of the vacancies, shall fill the vacancies by appointment. The person appointed by either the board or the county superintendent shall hold office until the next annual election, when a director shall be elected for the unexpired term."

The significant change is that, as applied to six-director districts, if there are more than two vacancies at any one time the county superintendent of schools will then fill the vacancies. This shows the legislative intent that at least four members of a six-director school district should be present to fill a vacancy on the board.

From all of the foregoing we conclude that it was the intention of the Legislature under a reasonable interpretation of the statutes involved to require that a quorum of four members of a six-director school district be present at the filling of a vacancy on the board.

The common law is in conformity with the foregoing statutory interpretation. If, however, the statutes do not specifically designate the number necessary for a quorum under the circumstances present in this case, then the common-law rule would apply.

In Section 1.010, RSMo 1959, it is provided that the common law of England is the rule of action and decision in this state. In the case of State ex rel. Otto vs. Kansas City, 276 S.W. 389, 1.c. 404, it is stated:

"The fundamental law authorizing the creation of such a body did not define a quorum or delegate the power to such body. We must look then to the common

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law as to what in such case would constitute a quorum, and the rule here clearly applicable is thus stated in 29 Cyc. 1688:

"Where a quorum is not fixed by the Constitution or statute creating a deliberative body, consisting of a definite number, the general rule is that a quorum is a majority of all the members of the body."

"The rule announced has been invoked in *Seiler v. O'Malley*, 190 Ky. 190, 227 S.W. 141, loc. cit. 142, and in *Heiskell v. City of Baltimore*, 65 Md. 125, 4 A. 116, loc. cit. 119, 57 Am. Rep. 308. The principle is recognized as a part of the common law of England in *Blacket v. Blizard et al.*, decided by the court of King's Bench in 1829, and reported in 9 Barnwell & Cresswell's Reports, 851."

In the case of *Blacket v. Blizard*, cited in the above quotation, at pages 862 and 863, Parke, J., said:

"The same rule of construction ought to prevail in a statute whereby the king, with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, grants certain powers of a public nature to a definite number of persons, as in a charter whereby the king by virtue of his prerogative alone grants similar powers to a definite body. It was clearly established in *Rex v. Bellringer* (a), as a rule of construction applicable to charters, that where the king grants that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, shall elect (the common council being a definite body consisting of thirty-six) a majority of the whole number of thirty-six must meet to form an elective assembly, and that if the corporation were so reduced that so many did not remain, no election could be had at all. \* \* \* The only question



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in this case will be, whether there is any thing in this act of parliament to control the general rule of construction which has been applied to similar words where they occur in the king's charters. Now the act certainly provides that a rate for building or enlarging a church must be made with the concurrence of four fifths in number of the persons constituting the select vestry. That provision applies to one case only; as to all others the act is silent. I think, therefore, that in all other cases the general rule of construction, applied to charters whereby the king has committed to a definite body the care of executing a public trust, ought to prevail. Here the trust to be executed is one in which the public have an interest. Unless we were to hold that a majority of the number required to constitute the select vestry should be present, it is possible that they might be reduced to a number so small as to be unfit to manage the affairs of the parish. That never could have been the intention of the legislature. \* \* \*

The case of *Blacket v. Blizard*, supra, refers to the case of *Rex v. Bellringer*, 4 T.R. 810, and in that case Lord Kenyon, Chief Justice, delivered the unanimous opinion of the court wherein, at 4 T.R. 823, he said:

" \* \* \* But the cases which were cited in the argument of this case are all one way, that there must be a major part of the whole number, constituted by the charter, in order to make the elections, and to do the several other acts under it. In *R. v. Varlo (b)*, Lord Mansfield observed upon the distinction, which is extremely well founded, between corporations consisting of a definite and an indefinite number; that in the latter a major part of those who are existing at the time is competent to do the act; but that where the body is definite (as it is in this case) there must be a major part of the whole number.

Honorable Lawrence F. Gepford

His Lordship's words are, 'Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter-days, and the major part who are present do the act. But where there is a select body, it is a different thing, for there it is a special appointment. All the reasoning therefore is different.' It appears to me therefore that it was his opinion, and that of the Court, that where there is a definite body, there must exist at the time when the act is done a major part of that definite body; it is not necessary indeed that they should all concur in the election, or other act done; but they must be present; and the election at such meeting is in point of law an election by the whole. In the case of *R. v. Monday* (a), Lord Mansfield asked this question, 'Is there any case where the charter has directed the election to be by the majority of the body, in which it has been held that a less number than a majority of the whole corporate body can elect? For instance, suppose the corporate body consisted of twelve, and two were dead; is there any instance where the charter has said that the election shall be by a majority of the body, in which it has been held that six, which are a majority of the remaining ten, were sufficient to elect?' This question was immediately answered by Aston, J. who said, that 'In *R. v. Reese* and *R. v. Newsham*, it was clearly understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election.'

\* \* \*

It is clear from these authorities that the common-law rule concerning the filling of a vacancy on a body which is



Honorable Lawrence F. Gepford

definite in number is that there must be a majority of the total authorized membership of the board present in order to constitute a quorum.

Applying this common-law rule to the present circumstances, it is clear that since there are six authorized members of the school board there must be at least four members present to fill the vacancy on the board.

In addition to the statutory interpretation and the common-law rule, the reported cases in Missouri are in accord with the conclusion reached in this opinion. The case of *State ex rel. Thurlo v. Harper*, 80 S.W.2d 849, was a quo warranto proceeding dealing with the purported appointment of school directors to fill vacancies in a six-director district. In that case the Supreme Court of Missouri, en Banc, said, 1.c. 852:

" \* \* \* Even if the three persons named were at the time legally qualified members of the board, the purported appointment would not have been valid as the presence of a quorum of the board was necessary to make a valid appointment and a quorum was not present at the time of the purported appointment. \* \* \*"

Therefore, on the basis of a reasonable interpretation of the statutes, the application of the common-law rule, and on the basis of the decided Missouri cases, we are of the opinion that a quorum of four members is necessary to make a valid appointment to fill a vacancy on the board of a six-director school district.

In the memoranda presented to us and mentioned in your opinion request, it is suggested that three directors should be a sufficient quorum to fill a vacancy because a minority of two members could absent themselves from a meeting and thereby defeat a quorum and defeat any action by the remaining members to fill a vacancy. We do not believe this reason is applicable to a school district in Missouri in view of Section 165.217. That section provides that a vacancy may occur in the office of director by "repeated neglect of duty." If any director of the school district repeatedly refuses to attend a meeting without reasonable cause, such conduct would constitute a repeated neglect of duty within the meaning of Section 165.217. Upon such occurrence a vacancy would occur



Honorable Lawrence F. Gepford

in the office of the director who had repeatedly refused to attend the meeting, and under the terms of Section 165.217 the county superintendent of schools could be notified of such vacancy and the county superintendent of schools could fill the same by appointment. Section 165.217 provides an effective statutory remedy to prevent a stalemate or deadlock in the circumstances under consideration. We believe that the Missouri statutes preclude the possibility of a stalemate or prolonged deadlock by a minority on a school board, and therefore the reason for the rule advanced is not applicable in Missouri.

Our conclusion that four directors are necessary to constitute a quorum in a six-director district in the matter of filling a vacancy on the board then requires an answer to your second question, which is, whether the withdrawal from the meeting by Messrs. McGovern and Dunn reduced the quorum previously existing.

We have been unable to find any Missouri case directly in point, and we must therefore base our conclusion on decisions in other jurisdictions on analogous situations.

School districts in Missouri may be classed as municipalities or municipal corporations. Such a conclusion is based upon the case of *Russell v. Frank*, 348 Mo. 533, 154 S.W.2d 63, in which it is stated, l.c. 67, that:

" \* \* \* The tax in this case was levied not by the state but by the school district, which is and was a municipal corporation as we have defined that term in *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 S.W.2d 65. The very purpose for which such municipal corporation is created is that of the maintenance of a school system. \* \* \*"

To this same effect are the cases of *St. Louis Housing Authority v. City of St. Louis*, 239 S.W.2d 289, and *Harrison v. Hartford Fire Insurance Company of Hartford, Connecticut*, 55 Fed. Supp. 241. We have also examined cases dealing with corporations.

In the memoranda submitted to us reference is made to the cases of *Hexter v. Columbia Baking Co.*, Del., 145 A. 115, *Commonwealth v. Vandegrift*, Pa., 81 A. 153, and *Atterbury v. Consolidated Coppermines Corp.*, Del., 20 A. 2d 743. These

Honorable Lawrence F. Gepford

cases are to the effect that the withdrawal of stockholders from a meeting to reduce the attending number below the quorum point will not be permitted.

The case of *Textron, Inc. v. American Woolen Co.*, 122 Fed. Supp. 305, was decided by the United States District Court in Massachusetts in 1954, and dealt with the number necessary to constitute a quorum at a stockholders meeting. In that case the court said, 1.c. 311-312:

"The defendant says that once present at a meeting, stock is always present for quorum purposes at subsequent adjournments. It cites some lower court cases which hold that once a quorum has been established at a stockholders' meeting the meeting can continue irrespective of the number of subsequent withdrawals. *Hexter v. Columbia Baking Co.*, 16 Del. Ch. 263, 145 A. 115; *Commonwealth v. Vandegrift*, 232 Pa. 53, 81 A. 153, 36 L.R.A., N.S., 45. I have grave doubts as to the soundness of those decisions. \* \* \*"

We have also examined cases which deal with the effect on a quorum when a number of members leave a meeting after the meeting has been in progress for some time.

In the case of *Gaskins v. Jones*, 198 S.C. 508, 18 S.E. 2d 454, the meeting of the governing board had been in session almost an entire day, resulting in a consistent tie on every ballot for the election of county manager. Shortly after five o'clock in the afternoon a motion to adjourn resulted in a tie vote and thereafter three members withdrew from the meeting and the remaining three members unanimously voted for a county manager. In that case the three members who withdrew actually left the courthouse where the meeting was taking place, and the trial court found that the three members were neither actually or constructively present. At page 457 of the case the court said:

"The situation is different from that which prevailed in the Indiana case of *State ex rel. Walden v. Vanosdal*, 131 Ind. 388, 31 N.E. 79, 15 L.R.A. 832. In that case a regular meeting of six school trustees was held for the purpose of electing a County School Superintendent.



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The meeting convened at midday and continued in session until around midnight. After a number of ballots were taken, not resulting in an election, three of the members refused to act longer or take further part in the proceedings. There were a number of bystanders looking on and listening to the proceedings. These three members withdrew from the place where the balloting was being held into the crowd of spectators, but did not leave the room. The Court held that a quorum was not broken under these circumstances although three of the members refused to vote. It was further held that where the three remaining trustees cast their ballots for a person, such a person was duly elected and the other trustees would be treated as present and not voting. The Court said: 'The three trustees stepped from the part of the room occupied by them among the bystanders. They could not change from trustees to mere spectators in the same room when they still had an opportunity to act and vote with the others, and thus prevent an election. Being present, it was their duty to act. They were in fact present.' The Court, however, made this pertinent observation: 'If the facts showed that the three trustees had in fact withdrawn from the meeting, and gone from the room, so as to have in fact left but three trustees in session, it would present an entirely different question.'

At page 456 of the Gaskins case, the court reviewed the common-law rule respecting a quorum, and at pages 457 and 458 the court said:

" \* \* \* The learned Circuit Judge made the following finding of fact: 'The meeting had gone on all day without the slightest evidence that a continuation of the voting would produce any different result, and hence I am of the opinion that those withdrawing from the

Honorable Lawrence F. Gepford

meeting were well justified in doing so, and that their action cannot be considered arbitrary, capricious or in any wise unreasonable.'

"We are not called upon to pass upon a situation where during the course of a meeting some of the members arbitrarily or without good reason withdrew leaving less than a quorum present."

We must pass on just such a situation in the present instance. Since the minutes of the meeting of April 24, 1963, were approved by all concerned, we look to them for the pertinent facts. Copies of the minutes have been supplied to us and the crucial events are chronicled in the minutes as follows:

"Motion by McGovern, seconded by Lehman, that the resignation of Mr. Lanoue be accepted as of April 24, 1963. Motion carried.

"Mr. West stated that due to the resignation there was now a vacancy on the Board, an appointment was necessary, and the 'Chair' was now open for suggestions.

"Mr. McGovern stated that he was in no position to make any at this time, Mr. Ryder moved to nominate Mr. Arnold Shanberg, seconded by Mr. Lehman. Mr. Dunn said that he could not act at this time as he had not had time to think about it, and could neither vote for or against any man at this time. Whereupon Mr. McGovern and Mr. Dunn left the meeting."

From the statement appearing in the minutes of the following meeting on April 29, 1963, it is evident that the purpose of the withdrawal of Mr. McGovern and Mr. Dunn was to defeat a quorum.

Under Section 165.217, RSMo 1959, when a vacancy occurs on the board of directors it becomes the duty of the five remaining directors, before transacting any official business, to appoint some suitable person to fill such vacancy. It was therefore legal and proper to immediately consider the filling



Honorable Lawrence F. Gepford

of the vacancy. The nomination of Mr. Shanberg was entirely in order, notwithstanding any protest made by Mr. McGovern or Mr. Dunn. See *Mullins v. Eveland*, 234 S.W.2d 639, 642.

In the case of *Bonsack & Pearce v. School Dist. of Marceline, Mo.*, 49 S.W.2d 1085, 1.c. 1088, it is said:

"Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them. \* \* \*"

In accordance with the language of this case, we hold that Mr. McGovern and Mr. Dunn had a duty to remain at the meeting and vote on the proposition which was presented to them.

The action of Mr. McGovern and Mr. Dunn in withdrawing from the meeting must be considered to be arbitrary because it is an attempt by a minority (two members) to prevent a quorum and thus to thwart the action of a majority (three members). Since each and every member has a duty to vote for or against any proposition which is presented to them (*Bonsack & Pearce v. School Dist. of Marceline, supra*), there can be no good reason for the precipitous withdrawal of Mr. McGovern and Mr. Dunn after the motion was made and seconded and before a vote was called thereon. Unlike the *Gaskins* case, *supra*, no vote had been taken before Mr. McGovern and Mr. Dunn withdrew. Their action cannot be justified when it is for the sole purpose of defeating a quorum. Under these specific facts Mr. McGovern and Mr. Dunn must be considered to be present for the determination of the existence of a quorum at the vote on the proposition which was submitted to them, even though they had actually left the room at the time the vote was taken.

There are Missouri cases which hold that when a member of a school board sits silently by when given an opportunity to vote he is regarded in law as voting with the majority. *Mullins v. Eveland*, 234 S.W.2d 639, 641. But it is unnecessary for us to make a determination of how Mr. McGovern and Mr. Dunn are to be considered as voting. This is because the three affirmative votes were a majority of the remaining five members of the board and such votes were sufficient to carry the proposition and effect the appointment of Mr. Shanberg even if Mr. McGovern and Mr. Dunn are regarded as voting against it.



Honorable Lawrence F. Gepford

Under the facts in this case we are of the opinion that Mr. Shanberg was validly appointed to fill the vacancy created by the resignation of Mr. Lanoue.

CONCLUSION

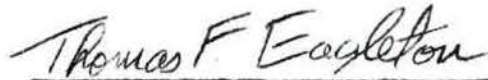
It is therefore the opinion of this office as follows:

1. When a vacancy occurs on the board of a six-director school district, a quorum of at least four members is necessary to fill such vacancy.

2. Under the facts in this case Mr. Shanberg was validly appointed to fill the vacancy on the board of the Center School District.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Very truly yours,



THOMAS F. EAGLETON  
Attorney General

WW:JGS:ml

August 26, 1963

Honorable Marvin L. Dinger  
Prosecuting Attorney of Iron County  
Ironton, Missouri



Dear Mr. Dinger:

This is in answer to your letter of July 3, 1963, in which you request an official opinion from this office. In your letter you state the following:

"Is a properly organized and existing Special Road District of a Missouri County, entitled under the provisions of Missouri Constitution, Article IV, Section 30 and Missouri Revised Statutes, Section 142.350, to any proceeds of the Missouri Motor Vehicle Fuel Tax?"

The answer to your question lies in a discussion of Article IV, Section 30(a), Constitution of Missouri, 1945. As you well know, this constitutional amendment became effective on March 6, 1962. The amendment provides for the imposition of a tax upon fuel used for propelling highway motor vehicles. Once the tax has been collected, certain refunds are made and then the remaining net proceeds of the tax, after deducting costs of collection, apportionment and making refunds is apportioned between the counties, cities, and the state in the following manner:

(1) Five per cent goes to a special trust fund which is credited to the various counties of the state.

(2) Fifteen per cent is allocated to the various incorporated towns, villages and cities having a population of more than 200 according to the last federal decennial census.

(3) The remaining eighty per cent of the net proceeds is allocated to the state.

There is no provision within the constitutional amendment for any fuel tax collected pursuant to it to be disbursed to road districts. Therefore, it is the opinion of this office that no state motor fuel tax is to be allocated to road districts.

In your letter you cite Section 142.350, RSMo 1959. We are of the opinion that the constitutional amendment repealed any conflicting statutory provisions formerly contained in Chapter 142, RSMo 1959. Section 142.350, supra, referred to the distribution of fuel tax collected by the state prior to the adoption of the constitutional amendment and, therefore, is to be disregarded when interpreting Article IV, Section 30(a), Missouri Constitution, 1945.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

EGB:bj

July 10, 1963



Honorable James E. Godfrey  
State Representative  
3rd District, City of St. Louis  
418 Olive Street  
St. Louis, Missouri

Dear Mr. Godfrey:

This is in reply to your letter of July 3, 1963, in which you requested an opinion as to whether or not Harris Teacher's College should receive State aid under Sections 168.230 and 168.240, RSMo 1959.

The State Department of Education has informed this office that Harris Teacher's College has received State aid under these sections over the past years, the last payment being \$96,662.00 for the school year which ended June 30, 1962.

I am further informed that the last General Assembly included an appropriation of \$275,000.00 for the purpose of making payments under these sections for the next biennium. The State Department of Education now has available \$137,500.00 for the purpose of making payments for the school year which ended June 30, 1963, and they are now in the process of allocating these funds to the various colleges entitled thereto in accordance with the provisions of Sections 168.230 and 168.240, RSMo 1959. This next payment will be made as soon as the applications can be processed.

I trust that this information is of interest to you and will suffice as an opinion in answer to your request of July 3, 1963. I am always happy to be of service in any way I can.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

DIVISION OF INDUSTRIAL INSPECTION:  
EMPLOYMENT AGENCIES:  
LICENSES:

Grant Cooper and Associates is operating or conducting an employment agency and is required to be licensed by the Division of Industrial Inspections.

October 1, 1963

OPINION No. 293

Don L. Cummings, Director  
Division of Industrial Inspection  
Department of Labor and Industrial  
Relations  
Jefferson City, Missouri



Dear Mr. Cummings:

In your letter of July 8, 1963, you request an opinion from this office in the following language:

"Enclosed herewith you will please find copies of correspondence that I have had concerning Grant Cooper and Associates at 1015 Locust Street, St. Louis 1, Missouri.

"My question at this time is that I would appreciate greatly an opinion from you as to whether Grant Cooper and Associates would be liable under Chapter 289 RSMo, 1949; and if they should be forced to obtain a private employment agency license?

"In addition to the correspondence mentioned above, I would like to call your attention to the ad run in the St. Louis Post Dispatch newspaper, as well as the enclosed information from Kay Williams Personnel and Executive Service Incorporated."

Section 289.010, RSMo 1959, provides in part:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for



Honorable Don L. Cummings

the same from the director of the division of industrial inspection of the state department of labor and industrial relations. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. The license, together with a copy of sections 289.010 to 289.040, shall be posted in a conspicuous place in each and every employment agency."

An employment agency may be defined as an agency for brokerage of labor for a fee paid by applicant for employment or by a prospective employer to any person or group engaged in the business of finding positions of employment. Florida Industrial Commission v. Manpower, 91 So. 2d 197.

We believe it is clear that under Section 289.010, supra, when any person, firm or corporation opens, operates or maintains an employment office or agency for hire in this state (or where a fee is charged to an applicant for employment in securing a position for him or where a fee is charged an employer for obtaining help) a license must be secured from the Division of Industrial Inspection. The fact that other services may be furnished to either the employer or to the employee is immaterial if, in fact, service is rendered to either with the intent of creating or establishing a relationship of employment between them.

You enclose a letter you received from Grant Cooper and Associates dated November 6, 1962. In this letter Grant Cooper states that he is giving complete analysis of their operation and activities and lists numerous services rendered in connection with his business. On page 3 of said letter it is stated:

"2. Our clients often give us the name of an individual in whom they are interested and ask us to determine whether or not this

Honorable Don L. Cummings

individual would consider changing positions and if so, what his salary requirement would be. We establish contact with the individual by telephone, letter or in person. A full report of our contact with this individual is given to the client company. They make the determination as to whether or not to continue with negotiations and if so, complete the negotiations and hire or reject as they see fit."

On page 4, paragraph 5, it is stated:

"Client companies have had us run help wanted advertisements over our name. In some cases responses were not reviewed by us but all of them referred to the client. In other cases, we have reviewed the responses and made recommendations as to the individuals the company should consider as prospects."

Also, on page 4, paragraph 7, the following statement is made:

"Our clients have requested that we find prospects for a specific opening. This may be done through advertising, search letters, telephone calls, United States Employment Service, use of college placement services, free employment services, trade associations, company lay-offs, and private employment agencies. It must be clearly understood that on such an assignment we have never worked on a fee basis or on a retainer basis. We have been paid by the client only by the hour and for the amount of expenses involved. I would like to emphasize that we are paid in this instance for the prospects developed and not on a basis of whether or not the company hires any of the prospects. In the development of the prospect list we interview, eliminate and recommend those considered to be suitable for the position available. It is important to know that these prospect lists become the property of the client who paid for our service and are not used to expose such persons for other immediate employment."

Honorable Don L. Cummings

We believe that services rendered by Grant Cooper and Associates to employers by contacting prospective employees to let such employee know of job openings as stated on page 3, paragraph 2, constitutes employment agency work, even though the employer and employee make the final determination concerning such employment.

We also believe that the services rendered the employers under paragraphs 5 and 7 of page 4 also constitutes employment agency work which, under Section 289.010, supra, requires a license by such person, firm or corporation for rendering such service.

In our opinion, it is immaterial as to whether the employer or employee is obligated to pay for the services so long as one or the other is required to pay Grant Cooper and Associates for such service.

You also enclose with your letter an advertisement which appeared in the St. Louis Post Dispatch on June 23, 1963. This advertisement is headed "Manufacturing Manager" and states the type of work or employment offered by the "client" and training and experience required of the employee together with the salary range. The telephone number and the office address in St. Louis of Grant Cooper and Associates is given in this advertisement. Certainly, this advertisement is an invitation or a request for any person who thinks he meets the qualifications of the job offered and is interested in securing such a position to get in contact with Grant Cooper and Associates. Certainly, such services as offered by Grant Cooper and Associates in this advertisement constitute services rendered by an employment agency under Section 289.010, supra.

#### CONCLUSION

Based on the information you have submitted, it is our opinion that Grant Cooper and Associates are engaged in representing employers in obtaining employees as well as representing employees in securing employment; that they charge a fee from either the employer or employee for such services, and that under the provisions of Section 289.010, RSMo 1959, they are required to be licensed by the Division of Industrial Inspection.

Honorable Don L. Cummings

The foregoing opinion, which I hereby approve, was prepared by my Assistant, A. Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

MM:lt

TAXATION:  
AIRLINE COMPANIES:  
COUNTY COLLECTOR:  
CITY COLLECTOR:  
CONSTITUTIONAL CHARTER CITIES:

Taxes levied by constitutional charter cities on locally assessed real and personal property of airline companies are to be entered in the city tax books and collected by the city collectors.

OPINION NO. 295

August 16, 1963



State Tax Commission  
100 East Capitol Avenue  
Jefferson City, Missouri

Gentlemen:

You have requested the opinion of this office on the following question:

"Should the property tax rates for first class and constitutional charter cities, which are to be levied on locally assessed real and tangible personal property of airline companies, be entered in the city tax books and collected by the city collectors, or should they be entered in the county railroad tax books and collected by county collectors?"

Chapter 155, Revised Statutes of Missouri, provides for the taxation of aircraft of airline companies. Section 155.060 of that Chapter specifically provides in part:

"Taxes levied on all aircraft under this chapter shall be levied and collected in the manner provided for the taxation of railroad property, and the county courts and other officials shall perform the same duties and may exercise the same powers in levying and collecting the taxes on aircraft as such officials are required to perform in the levy and collection of taxes on railroad property.  
\* \* \*

The only reference in Chapter 155 to property other than aircraft is contained in Section 155.070 which provides as follows:

"All real property, or tangible personal property of whatever kind, of an airline company, with the exception of its aircraft, shall be assessed by the proper



assessors in the several counties, cities, incorporated towns and villages wherever the property is located, under the general revenue laws of the state and municipal laws regulating the assessments of other local property in the counties, cities, incorporated towns and villages, respectively."

Section 151.100, RSMo, contains provisions somewhat similar to Section 155.070 relating to the assessment of local property of railroads. However Section 151.100 has the additional provision that "the taxes on the property so assessed shall be levied and collected according to the provisions of this chapter." (Ch. 151). Detailed provisions are set forth in Chapter 151 respecting the levy and collection of taxes on local property, both real and personal, of railroads, including those taxes due cities. All such taxes are due and payable to the county collector under the provisions of Section 151.200, RSMo. There is no comparable statutory provision contained in Chapter 155 respecting the levy and collection of taxes on local property of airline companies.

Inasmuch as Section 155.060 is in terms limited to the levy and collection of taxes on aircraft, it follows that only taxes on aircraft are to be levied and collected in the same manner as those provided by law for the taxation of railroad property, and that taxes levied and collected on all other property, both real and tangible personal, belonging to airline companies are to be levied and collected in the same manner as that provided by law with respect to similar property of all other taxpayers.

There is no basis in our statutes for differentiating between property of airline companies, other than aircraft, and similar property belonging to other taxpayers. Hence, the property of airline companies, other than aircraft, and the taxes thereon may not be entered on the railroad tax book.

### CONCLUSION

Taxes levied by constitutional charter cities on locally assessed real and personal property of airline companies are to be entered in the city tax books and collected by the city collectors.

State Tax Commission

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The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

JN:ga

SAFETY RESPONSIBILITY:  
MOTOR VEHICLE SAFETY RESPONSIBILITY:

A judgment-creditor need not proceed against the surety bond, given by the judgment-debtor as proof of financial responsibility before the Director can suspend the license and registration of said judgment-debtor for failure to satisfy the judgment. A judgment is deemed satisfied when the amounts and conditions of payment have been met in Section 303.120, RSMo 1959.

October 17, 1963

OPINION NO. 296

Honorable Earl R. Blackwell  
State Senator, 22nd District  
Hillsboro, Missouri



Dear Senator Blackwell:

This is in answer to your recent letter requesting an official opinion from this office. In your letter you seek our interpretation of certain sections found within the Missouri Motor Vehicle Safety Responsibility Law, Chapter 303, RSMo 1959. (All statutory references herein shall be to the Revised Statutes of Missouri, 1959, unless otherwise designated.) Without directly quoting your letter, we believe you have presented the following problem for our consideration:

B, while driving an automobile owned by him, was involved in an accident which resulted in damages to A. A sued B for his damages arising out of this accident. B had previously given the Director of Revenue a surety bond as proof of financial responsibility [proof of ability to respond in damages for liability on account of accidents occurring after the effective date of the bond, Section 303.020(10)] pursuant to Section 303.230, and thus, was not required to deposit security with the Director to satisfy any judgment which might arise out of this accident, Sections 303.030; 303.060. A eventually obtained a judgment for more than twice the amount of the bond.

Honorable Earl R. Blackwell

Question: Must A proceed against B's surety bond before the Director can suspend B's drivers license and motor vehicle registration under Section 303.100?

The answer to this question is "No". Section 303.230 allows a judgment-creditor the right to bring an action in the name of the state against the company or persons executing the judgment-debtor's bond. This procedure can be followed only if the judgment is not satisfied within sixty days after it becomes final. However, the right to sue granted to the judgment-creditor is separate and distinct from the duties imposed upon the Director.

If any person fails to satisfy a final judgment within sixty days, then the clerk of the court in which such judgment is rendered, is required to forward a certified copy of said judgment to the Director, Section 303.090. Upon receipt of the certified copy of the judgment, Section 303.100 says that the Director "\*\*\* shall forthwith suspend the license and registration and any non-resident's operating privilege of any person against whom such judgment was rendered\*\*\*." Section 303.100 makes only two exceptions or qualifications to such a suspension. One is when the judgment-debtor obtains from the court rendering such judgment, permission to pay the judgment in installments. The other is when the judgment-creditor consents in writing that the judgment-debtor be allowed his license and registration and the judgment-debtor furnishes proof of financial responsibility.

A surety bond given as proof of financial responsibility under Section 303.230, "\*\*\*shall be conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy\*\*\*." Section 303.190 says that a motor vehicle liability policy needed as satisfactory evidence of financial responsibility, is subject to the following limits:

"\*\*\*Five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and two thousand dollars because of injury to or destruction of property of others in any one accident."

Honorable Earl R. Blackwell

Thus, the above amounts and payment conditions are those required for a surety bond. If the principal or surety pays the judgment-creditor under these conditions and for these amounts, then, for the purpose of the Safety Responsibility Law, such judgment is deemed satisfied, Section 303.120. That section specifically provides that for the purpose of the law in question, judgments shall be deemed satisfied (1) when five thousand dollars has been credited upon a judgment or judgments rendered in excess of that amount because of injury to or death of one person as the result of any one accident, or (2) when, subject to such limit for one person, ten thousand dollars has been credited upon any judgment or judgments in excess of that amount because of injury to or death of two or more persons as the result of any one accident, or (3) when two thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as the result of any one accident. If the judgment is "satisfied" as provided in Section 303.120, then the Director is not authorized to suspend the judgment-debtor's license and registration under Section 303.100. Therefore, the fact that A obtained a judgment for more than twice the amount of B's surety bond has no relation to the problem herein discussed.

#### CONCLUSION

A judgment-creditor need not proceed against the surety bond, given by the judgment-debtor as proof of financial responsibility under Section 303.230, RSMo 1959, before the Director of Revenue can suspend the license and registration of said judgment-debtor for failure to satisfy the judgment. A judgment is deemed satisfied when the amounts and conditions of payment have been met in Section 303.120, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

EGB:bjj



September 9, 1963



Honorable Walter L. Meyer  
State Representative  
Fourth District  
St. Louis County  
9495 Yorktown Drive  
Bellefontaine Neighbors 37, Missouri

Dear Mr. Meyer:

You have requested this office for an opinion concerning the right and power of the City of Bellefontaine Neighbors, a city of the fourth class, to construct a flood wall project to protect the city from possible flooding of the Mississippi river.

It would appear that Sections 79.390 and 79.470, RSMo 1959, contain a grant of power to cities of the fourth class which is broad enough to authorize the flood wall project.

Relating to the power of condemnation, Section 88.667, RSMo 1959, grants fourth class cities power to condemn private property, and Section 88.077, RSMo 1959, authorizes all cities to condemn private property outside the city limits for authorized purposes.

Section 95.405, RSMo 1959, authorizes cities of the fourth class to issue bonds for "other improvements." This language probably would be broad enough to cover the proposed flood wall project.

With reference to your inquiry concerning cooperation with the federal government in this project, this would be authorized under Chapter 70 of the Revised Statutes of Missouri, 1959.

We sincerely hope that these citations and suggestions will be of assistance to the City Attorney of Bellefontaine

Honorable Walter L. Meyer

#2

Neighbors in reaching a conclusion and determination of the problems you present. We also enclose herewith a copy of an opinion dated July 3, 1957, to William A. Geary, Jr., and copy of an opinion dated April 18, 1956, to Haskell Holman. We believe these opinions may shed some light on this problem.

If, as you intimate, the city contemplates the issuance of bonds, then in the final analysis the problem must be passed upon by the city's bond attorney. We suggest that it would be entirely appropriate to submit these problems for final determination by the city's bond attorney.

We do hope that the foregoing information and suggestions will be of aid and assistance to you and to the officials of the City of Bellefontaine Neighbors.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

By  
J. Gordon Siddens  
Assistant Attorney General

JGS:ml  
Encs (2)

December 18, 1963



E. V. Nash, Warden  
Missouri State Penitentiary  
Jefferson City, Missouri

Dear Warden Nash:

This refers to your letter of July 16, 1963, and our subsequent conversations with you and others associated with the Department of Corrections concerning the purchase of Inlots 191 and 192 of the City of Jefferson, Missouri, by the State of Missouri, for the use and benefit of the Missouri State Penitentiary, pursuant to a contract which was enclosed with your letter and an appropriation which was made by the General Assembly this year.

You furnished an abstract of title for Inlots 191 and 192 which was certified by Cole County Abstract, Realty and Insurance Co., Jefferson City, Missouri, on July 12, 1963, at 5:00 p.m.

It is our opinion that the abstract shows that, as of the date of its certification, merchantable title of record was vested one-fourth in Mary Church Barrett, one-fourth in Elizabeth Church, and one-half in A. E. Blaser and Grace L. Blaser, husband and wife, subject to the lien of taxes for 1963 and to a certificate being obtained showing no federal court judgments against the owners of said real estate.

It is our information, however, that A. E. Blaser died some years ago without having been divorced from Grace L. Blaser, so that title to their one-half interest in said real estate vested in Mrs. Blaser alone. This is not shown by the abstract and we require that there be obtained and recorded and shown in the abstract an affidavit of some person familiar with the facts, showing the date and place of Mr. Blaser's death and the fact that he died without having been divorced from Mrs. Blaser.

E. V. Nash, Warden

Further, as stated in your letter, Grace L. Blaser died in July, 1963, subsequent to her execution of the contract to sell said real estate to the State of Missouri. Her estate is being administered in the Probate Court of Cole County, Missouri, and one of her sons, Arthur E. Blaser, is the administrator. At the suggestion and request of Russell Keyes, attorney for the administrator, this office has filed a petition with the Probate Court of Cole County, Missouri, asking that the court order the administrator to execute specifically the contract to sell the decedent's one-half interest in Inlots 191 and 192 to the State of Missouri and to execute an appropriate deed for that purpose. This petition and an entry of appearance prepared by Mr. Keyes and signed by the administrator were filed on December 4, 1963. Copies thereof are enclosed herewith. We requested that the court enter an order setting this matter for hearing on December 27, 1963, and we assume that the order directing the administrator to convey the decedent's interest in this real estate will be made as a routine matter and without opposition.

We are furnishing to Mr. Keyes a copy of this letter and a suggested form of order to be entered by the court in this matter. It is our understanding that Mr. Keyes will take care of getting the order entered and will prepare the deed to be executed by the administrator. This action to obtain specific execution of the contract has been taken pursuant to Sections 473.303 to 473.313, RSMo 1959, and we call attention particularly to Section 473.310 which contains provisions with respect to the form of deed to be executed by an administrator, including the fact that the deed must be acknowledged in open court. We also note that the contract for the sale of the land and the proposed court order provide for a warranty deed. None of the proceedings with respect to the administration of Mrs. Blaser's estate are shown in the abstract of title and such proceedings, through the entry of the order to convey this real estate, should be shown therein at the expense of the estate.

We have also prepared and enclose herewith separate deeds for execution by Mary Church Barrett and Elizabeth Church conveying their interests in this real estate. Since Mrs. Barrett lives in St. Louis, it would expedite the closing of this transaction if she would execute her deed at once and deliver it to someone in Jefferson City to be held in escrow pending payment of the purchase price. You may wish to take up with Mr. Keyes or Mr. Blaser the matter of obtaining execution of this deed.

E. V. Nash, Warden

Since it appears that all exceptions and requirements mentioned above can be readily satisfied and that it should be possible to obtain merchantable title and close this transaction shortly after the entry of the proposed court order on December 27, 1963, we believe that it is in order for you to requisition the checks in payment of the purchase price of the real estate. There should be one check payable to Arthur E. Blaser, administrator, estate of Grace L. Blaser, deceased, in the amount of Four Thousand One Hundred and Twenty-five Dollars (\$4,125.00). There should also be separate checks payable to Mary Church Barrett and Elizabeth Church, each in the amount of Two Thousand Sixty-two Dollars and Fifty Cents (\$2,062.50).

One copy of the contract which was enclosed with your letter is returned herewith. The other copy was filed with the petition which we filed in the probate court. The abstract of title has been delivered to Mr. Keyes. A copy of the proposed form of court order also is enclosed for your records.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

JCB:df  
Encs.



COUNTIES:  
COUNTY COLLECTORS:  
STATUTES:  
COMPENSATION:  
CONSTITUTIONAL LAW:

Senate Bill No. 259, 72nd General Assembly, becomes effective Oct. 13, 1963. It does not violate Sec. 13, Art. VII, Constitution of Mo., 1945, as to collectors in 1st or 2nd class counties <sup>or counties</sup> under charter. Collectors in 3rd or 4th class counties which fall into the classification of Subdivision (15) of the bill are, during their current term of office, limited to the compensation authorized by Section 52.270, RSMo 1959.

September 4, 1963

OPINION NO. 303

Honorable Alfred A. Speer  
Representative, 12th District  
St. Louis County  
101 South Meramec  
Clayton 5, Missouri



Dear Mr. Speer:

This is in response to your recent request for an opinion of this office which request reads as follows:

"The recent General Assembly enacted Senate Bill 259, Subsection (15) of which altered the commission to be paid County Collectors who collect over Four Million Dollars (\$4,000,000) in taxes per year.

"As you know, St. Louis County collects well over \$4,000,000 in property taxes per year, and that by its ordinances the Collector of Revenue is salaried and all such commissions due him are paid into the County's general revenue fund. However, I do not know whether the other Counties affected by Subsection (15) have salaried collectors.

"Will you please give me your opinion whether this new act is invalid with respect to Article VII, Section 13 of the Missouri Constitution dealing with an increase in salary of public officials while in office, and also the date on which this act should be implemented."

Honorable Alfred A. Speer

Senate Bill No. 259 of the 72nd General Assembly effected a repeal of Section 52.260, RSMo 1959, and an enactment of a new section to be known as 52.260, which, as it applies to your questions, reads as follows:

"Section 1. Section 52.260, RSMo 1959 is repealed and one new section enacted in lieu thereof, to be known as section 52.260, to read as follows:

52.260. The collector in counties not having township organization shall collect and retain the following commissions for collecting all state, county, bridge, road, school and all other local taxes, including merchants', manufacturers' and liquor and beer licenses, other than back, delinquent and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees:

\* \* \* \*

(15) In counties wherein the total amount levied for any one year exceeds four million dollars, a commission of one per cent on the amounts collected."

The act does not purport to increase the compensation of county collectors who are paid by "salary in lieu of fees." Since collectors of counties of the first and second classes are paid by salary, Section 52.320, RSMo 1959, Section 52.420, 1961 Cum. Supp., and since the salary of officers in counties having charters is governed solely by those counties, Section 18(e), Article VI, Constitution of Missouri, 1945, the compensation of such officers will not be increased by the provisions of Senate Bill No. 259. Hence, the constitutional prohibition against an increase in an officer's compensation during his term of office, Section 13, Article VII, Constitution of Missouri, 1945, can in no way affect or delay the date upon which Senate Bill No. 259 becomes effective in such counties.

Honorable Alfred A. Speer

Since Subdivision (15) applies to all counties wherein the "total amount levied for any one year exceeds four million dollars . . .", it is conceivable that it could apply to counties of the third and fourth class. Because the collectors in those counties are compensated by commissions, it is possible that Senate Bill No. 259 could cause an increase in their compensation by making the provisions as to limitations on the amount of commissions collectors are allowed to retain found in Section 52.270, 1961 Cum. Supp., inapplicable to such collectors. This section imposes limitations on the amount of commissions retainable by collectors in the classifications indicated in Subdivisions (1) through (14) of Section 52.260, but makes no reference to the collectors who come within the newly created Subdivision (15).

However, we are not advised as to whether any counties of the third and fourth classes, by virtue of their respective tax levies, do in fact come within the provisions of Subdivision (15); and any definitive pronouncement in this area would be based solely on speculation. Suffice it to say that if Subdivision (15) did increase the amount of commissions retainable by removing certain collectors from the limitations set out in Section 52.270, supra, Section 13, Article VII of our Constitution would prevent such collectors from receiving compensation in excess of the presently established limits during their current terms of office. *State ex rel. Emmons v. Farmer* (Mo. Sup. 1917), 196 SW 1106, 1109[5, 6]. See also opinion of the Attorney General to Milton Carpenter dated December 30, 1959, pp. 7-8, attached herewith. Such a contingency would, however, have no effect upon the applicability of all other provisions of the law.

We turn now to your question concerning the effective date of Senate Bill No. 259. Since the bill contains no emergency clause and is not an appropriation act, it will become part of the law of this state "ninety days after the adjournment of the session at which it was enacted . . .", Section 29, Article III, Constitution of 1945. The 72nd General Assembly having adjourned on July 15, 1963, and Senate Bill No. 259 having been approved by the Governor, it will become effective on October 13, 1963.

Honorable Alfred A. Speer

CONCLUSION

It is the opinion of this office that Senate Bill No. 259 of the 72nd General Assembly will become effective October 13, 1963, in all counties, and that such bill does not increase the compensation of collectors in first or second class counties or counties under a constitutional charter, and such bill will not, during the term of the collectors of third and fourth class counties now in office, authorize the payment to such collectors of compensation in excess of that authorized to be retained by such collectors under the provisions of Section 52.270, RSMo.

This opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

AJS:kld;ml

COUNTIES:  
OFFICERS:  
COUNTY COURTS:  
COUNTY HEALTH OFFICER:  
COUNTY HEALTH CENTER:

In those counties which have a county health center, the county court should appoint the director of the public health center as the county health officer.

August 12, 1963

Opinion No. 306

Honorable Paul Boone  
Prosecuting Attorney  
Ozark County  
Gainesville, Missouri



Dear Mr. Boone:

This is in reply to your letter of July 23, 1963, requesting an opinion from this office. Your letter reads as follows:

"I would like your opinion concerning two separate sections of the Missouri statutes concerning a county health officer.

"Section 192.260 RS Mo 1959 provides:

"The County courts of the several counties of this state may appoint a duly licensed qualified physician as a county health officer for a term of one year, and in the event a vacancy is created in the office of the county health officer, such court may appoint a duly licensed qualified physician for the unexpired term. If the county court of any county decides to appoint a county health officer as empowered in this law, it shall agree with the officer as to the compensation and expenses to be paid for such service, which amount shall be paid out of the county treasury of the county. Nothing contained herein shall be construed to require the county court of any county to appoint a county health officer in any county."



"Section 205.100 RS Mo. 1959 provides:

"The county court or courts shall annually at their February meeting, appoint the director of the public health center as county health officer and such county health officer shall exercise all of the rights and perform all of the duties pertaining to that office as set forward under the health laws of the state and rules and regulations of the division of health of the department of public health and welfare."

"It appears to me the two statutes in conflict, in that the first section appears to be directory, and the second appears to be mandatory with the further provision that the director of the public health center of the county be appointed. Our county does have a county health center."

"Would you give me your opinion concerning the apparent conflict, and which of the statutes should our county court use in considering the appointment of a county health officer?"

Section 205.100, RSMo 1959, quoted in your letter, was originally enacted in 1945 and is found in substantially its present form in Laws of 1945, page 969, House Bill 280, Section 7. The 1949 revision changed the designation of the office from "deputy health commissioner" to "county health officer."

Section 192.260, RSMo 1959, is of more ancient vintage. Former revisions of this law date back to Section 5421 of the revision of 1889. As amended in Laws of 1919, page 373, the law provided that the county court "shall" appoint a deputy state commissioner of health. In Laws of 1933, page 271, the law was changed to provide that the county court "may" appoint a deputy state commissioner of health. The 1945 Act rephrased the section without substantially changing its meaning. The 1949 revision act designated the appointees as county health officers rather than deputy state commissioners of health.

In 82 C.J.S., Statutes, Sections 366, 368 and 369, is given the general rules of statutory construction which we quote as follows:

82 C.J.S., page 801. "Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in *pari materia*. \* \* \* Under the so-called '*pari materia*' rule of construction, it is well established that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or all statutes having the same general purpose, that is, statutes which are in *pari materia*, should be read in connection with it; and such related statutes may or should be construed together as though they constituted one law, that is, they must be construed as one system, and governed by one spirit and policy, and the legislative intention must be ascertained, not alone from the literal meaning of the words of a statute, but from a view of the whole system of which it is but a part. This rule of construction applies although the statutes to be construed together were enacted at different times, and contain no reference to one another; and it is immaterial that the statutes are found in different chapters of the revised statutes and under different headings."

82 C.J.S., page 810. "The court must harmonize statutes relating to the same subject, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious system or body of legislation, if possible."

82 C.J.S., Section 368, page 836. "Statutes in *pari materia*, although in apparent conflict, or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each

other, so as to give force and effect to each; but, if there is an unreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute."

82 C.J.S., Section 369, page 839. "General and special statutes should be read together and harmonized, if possible; but, to the extent of any necessary repugnancy between them, the special statute will prevail over the general unless it appears that the legislature intended to make the general act controlling."

In State ex rel. Peck Company v. Brown, 105 SW2d 909, 1.c. 911-912, it is stated:

"In construing statutes in pari materia, 'endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments.' 16 Cyc. 1147. We approved the above excerpt in State ex rel. Columbia National Bank v. Davis, 314 Mo. 373, 284 S.W. 464."

Following these general rules of statutory construction, it is our opinion that Section 192.260 and 205.100 should be read and construed together. They should be harmonized, if possible. It is apparent that Section 192.260 is a general statute and is permissive in nature. It provides that the county court "may" appoint a county health officer. This statute is applicable to all counties in Missouri regardless of whether there is a county health center in the county.

On the other hand, Section 205.100 is of more restricted application. It would apply only to those counties where there is a public health center and a director thereof. Where there is a director of the public health center in a county, Section 205.100 provides that the county court shall appoint such director as county health officer.

We are of the opinion that the two statutes can be harmonized, and that effect can be given to each of them. In your letter, you state that Ozark County does have a county health center. This being so, the provisions of Section 205.100 should be applied and the director of the public health center should be appointed as county health officer. When so considered and construed there is no conflict between the two statutes and they are thus in harmony with one another.

#### CONCLUSION

It is therefore the opinion of this office that there is no conflict between Sections 192.260 and 205.100, RSMo 1959, and that they should be construed together and harmonized and effect given to each of them. We are further of the opinion that the director of the public health center should be appointed as county health officer in those counties which have a county health center, in accordance with Section 205.100, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

July 24, 1963



Honorable Michael Kinney  
211 North Seventh Street  
St. Louis, Missouri

Dear Senator Kinney:

I have your letter of June 25, 1963, in which you inquire as to whether the sale of souvenirs, antiques, novelties, post cards, and greeting cards will be prohibited on Sunday when Senate Bill No. 49 becomes effective on October 13, 1963.

Section 1 (1) of the Bill reads in part as follows:

"Whoever engages on Sunday in the business of selling or sells or offers for sale on such day at retail motor vehicles; clothing and wearing apparel; clothing accessories; furniture; housewares; home, business or office furnishings; household, business or office appliances; hardware; tools; paints; building and lumber supply materials; jewelry; silverware; watches; clocks; luggage; musical instruments and recordings or toys; excluding novelties and souvenirs, is guilty of a misdemeanor..."

Souvenirs and novelties are specifically exempted.

Post cards and greeting cards are not mentioned at all, so I see nothing to prohibit their sale.



Honorable Michael Kinney - 2.

July 24, 1963

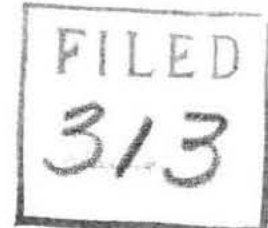
Antiques as a class are not mentioned. To the extent that same are either souvenirs or novelties, or to the extent that they are antique varieties of things not specifically prohibited, then antiques can be sold on Sunday. Contrariwise, to the extent they fall without the souvenir or novelty class and fall within the categories of things prohibited for sale, then they seemingly could not be sold on Sunday.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

November 1, 1963



Honorable Harry Keller  
Representative of Eighth District  
Jackson County  
4119 Troost Avenue  
Kansas City 10, Missouri

Dear Representative Keller:

We have your opinion request of July 26, 1963 in which you ask five questions of this office. Questions 2 through 5 will be answered in a separate opinion to be issued shortly.

Your first question related to the legality of the County Court of Jackson County to expend funds for a newspaper advertisement which sets forth the advantages of Jackson County in terms of industrial expansion. The advertisement deals with the finances of the county, its bonded indebtedness and bond rating, tax levies, etc., etc., and pictorially depicts various points of interest in the county.

We have checked with the County Counselor's office in Jackson County and find that on at least two occasions in years past the County Counselor has approved the legality of such expenditures, i.e. September 23, 1952 (County Counselor Hilary A. Bush) and October 18, 1961 (County Counselor Cornelius Costello).

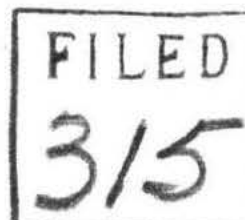
With respect to questions of local government in those counties or cities which enjoy the services of a legal department, we defer to the authority of said legal departments in determining questions of law relating to said local governmental entity.

Thus, under these circumstances, we would suggest that the advice already given by two County Counselors would be sufficient authority so as to constitute a good faith decision by the County Court in making the expenditure.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

August 16, 1963



Honorable Larry M. Woods,  
State Representative, 1st District  
Boone County  
502 Guitar Building  
Columbia, Missouri

Dear Mr. Woods:

In reply to your opinion request of July 29, 1963, concerning the situation existing with the Land Clearance and Redevelopment Authority of the City of Columbia, Missouri, and the sale of a tract of land for redevelopment to Mr. William H. Simon, wherein the brother of William H. Simon, Mr. B. D. Simon, Jr., is Chairman of the Board of Commissioners of such Authority, it is to be noted that the Authority by Section 99.320, RSMo is stated to be a " \* \* \* public body, corporate and politic, " \* \* \*. Further, that the commissioners of such Authority are subject to several restrictions among them those contained in Section 99.400, RSMo wherein it is specifically provided that "no commissioner or employee of an authority shall voluntarily acquire any interest, direct or indirect, in any land clearance project or in any property included or planned by the Authority to be included in any such project, or in any contract or proposed contract in connection with any such project."

It is noted in your opinion request that it is publicly stated, although not appearing of record, that the purchaser of this tract of land, Mr. William H. Simon, intends to lease the building, which he is to construct upon this tract of land, to a corporation in which both he and his brother, Mr. B. D. Simon, Jr., are shareholders and officers. We have given considerable thought to this situation and it appears to us that the question is as stated in your letter, i.e.: Is this such an interest on the part of Mr. B. D. Simon, Jr., as to constitute a violation of Section 99.400, RSMo? And in answer to this question, I am enclosing herewith

Honorable Larry M. Woods - 2

a copy of an opinion issued by this office on May 15, 1958, to the Honorable Rolin T. Boulware, Prosecuting Attorney, Shelby County, Shelbyville, Missouri, which opinion while it specifically rules upon the city officials and the scope of Section 106.300, RSMo, we believe is applicable to the case at hand arising under Chapter 99, RSMo.

It is the opinion of this office that a careful reading of the enclosed opinion and the cases therein cited will furnish the answer to the question which you have presented.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

RRN:df

Enc.

August 12, 1963



Board of Public Buildings  
State Capitol  
Jefferson City, Missouri

Gentlemen:

We have been requested by Mr. John D. Paulus, Jr., to furnish an opinion whether he may legally receive a salary as Acting Director of Public Buildings in addition to his salary as Chief of Planning and Construction.

Mr. Paulus holds the statutory position of Chief of Planning and Construction, and Section 8.290, RSMo 1959, provides that his compensation as such "shall be fixed by the comptroller, with the approval of the governor, at a sum not to exceed twelve thousand dollars annually payable in equal monthly installments".

The position of Director of Public Buildings is created by Section 8.020, RSMo 1959, which provides that such officers shall receive an annual salary of \$7500.00. That position has not been filled during the present state administration but the Board of Public Buildings has designated Mr. Paulus as Acting Director of Public Buildings and he has been serving as such since 1961. Under Section 8.030, RSMo 1959, the Director of Public Buildings, with the approval of the Board of Public Buildings, employs and fixes the compensation of other officers and employees of the Division of Public Buildings. Since he is Acting Director, rather than Director, Mr. Paulus would not be entitled by law to the statutory salary, but he could receive such salary as might be approved by the Board of Public Buildings, unless this is prevented by the fact that he is Chief of Planning and Construction.

The first question is whether Mr. Paulus may legally hold both of the positions now held by him. There is no general constitutional or statutory prohibition against the holding of two state offices or employments in Missouri and we find no specific prohibition against the same person holding the two positions now held by Mr. Paulus. There is a common law rule, followed in this state, which is to the effect that the same person may not hold two incompatible offices. However, from an examination of the



pertinent statutes, we find no basis for holding that the powers and duties which Mr. Paulus might have as Acting Director of Public Buildings are incompatible with those of the Chief of Planning and Construction. Moreover, it would appear that this question was resolved, as a practical matter, when the Board of Public Buildings designated Mr. Paulus as Acting Director of Public Buildings over two years ago.

The second question is whether there is any reason why Mr. Paulus may not legally receive separate salaries for each of the two positions legally held by him. Here, again, we find no general or specific constitutional or statutory prohibition against the payment of compensation for both positions. In the absence of such a prohibition, we know of no reason why Mr. Paulus legally may not be paid a salary for the added responsibilities assumed by him as Acting Director of Public Buildings as well as his statutory salary as Chief of Planning and Construction.

The question whether, as a matter of policy, Mr. Paulus should be paid two salaries is, of course, one for determination by the Board of Public Buildings and one concerning which no opinion is expressed herein.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JCB:oa

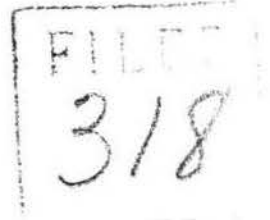
DIVISION OF COMMERCE & INDUSTRIAL  
DEVELOPMENT:  
INDUSTRIAL DEVELOPMENT:  
MUNICIPAL CORPORATION:

The cities of Clarksville, Bowling  
Green and Louisiana may cooperate  
with each other on industrial  
development projects.

December 24, 1963

Opinion No. 318

Mr. Lawrence A. Schneider  
Director, Division of Commerce  
and Industrial Development  
Eighth Floor, Jefferson Building  
Jefferson City, Missouri



Dear Mr. Schneider:

In your letter of July 20, 1963, you request an opinion  
from this office in the following language:

"John A. Croll, Area Community Develop-  
ment Agent, representing communities of  
Marion, Monroe, Pike and Ralls Counties,  
has posed the following question: Can  
two or more municipalities participate  
cooperatively in a municipally financed  
industrial project?

"The cities of Clarksville, Bowling Green,  
and Louisiana are currently interested in  
the possibility of jointly financing a  
manufacturing plant through municipal bonds.

"I think you should assume the opinion to  
be rendered after S. B. #289 has become  
effective.

"If you could also state what limitations  
and procedures there are, it would be most  
helpful."

Constitutional authority for cooperation between  
municipalities and political subdivisions of this State is  
found in Article VI, Section 16, Constitution of Missouri,  
which reads as follows:

Mr. Lawrence A. Schneider

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Statutory authority for cooperation between municipalities is found in Section 70.220, RSMo 1959, as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (Emphasis supplied.)



Mr. Lawrence A. Schneider

It should be noted that under Section 70.220, supra, municipalities and political subdivisions may contract and cooperate with other municipalities or political subdivisions when the subject or purposes of such contract are "within the scope of the powers of such municipality or political subdivision". Therefore, we must determine whether the proposed project as mentioned in your letter comes within the scope of the powers and authorities granted to the municipalities mentioned herein.

Article VI, Section 23a, Constitution of Missouri, as adopted November 8, 1960, provides in part that any incorporated city, town or village within any county having a population of less than 400,000 population by a vote of two-thirds of the voters may become indebted for and may purchase, construct, extend or improve plants for manufacturing and industrial development purposes under the conditions as provided therein. It also exempts cities from some other constitutional provisions concerning the limits of bonded indebtedness of the city. This constitutional provision is often referred to as the general revenue bond provision for industrial development purposes.

In State ex rel. City of Charleston vs. Holman, 355 SW2d 946, the Supreme Court held this constitutional provision was not self enforcing and therefore required action by the Legislature before it became legally effective.

Under Article VI, Section 27 of the Constitution of Missouri adopted November 8, 1960, it is provided any city or incorporated town or village by a vote of four-sevenths of the voters may issue revenue bonds for the purpose of purchasing, constructing, extending or improving plants for manufacturing and industrial development purposes, the bonds to be paid solely from revenues derived from the operation of such plant or facility. This constitutional provision is often referred to as the revenue bond provision for industrial development purposes.

In Petition of Monroe City, 359 SW2d 706, the Supreme Court held Section 27 of Article VI was not self enforcing and therefore requires statutory legislation to put it into effect. Therefore, we must look to statutory authority authorizing cities to cooperate on a project for industrial development purposes.

Mr. Lawrence A. Schneider

Statutory authority for the purchase, construction, maintenance and operation of industrial development projects is found in Sections 71.790 to 71.850, RSMo Cum. Supp. 1961. These statutory provisions provide for the procedure to be followed by municipalities that desire to avail themselves of the provisions of the constitution providing for industrial development projects.

Senate Bill No. 289 enacted by the 72nd General Assembly repealed Section 71.790, RSMo Cum. Supp. 1961, and enacted a new Section 71.790, VAMS, Sept. 1963, page 22, with this amended provision:

"71.790. Definitions

"As used in sections 71.790 to 71.850, unless the context clearly indicates otherwise, the following words and terms have the following meanings:

\* \* \* \* \*

"(5) 'Project for industrial development' or 'project', the purchase, construction, extension and improvement of industrial plants, including the real estate either within or without the limits of such municipalities, buildings, fixtures, and machinery; except that any project of a municipality having fewer than eight hundred inhabitants shall be located wholly within the limits of the municipality."

Courts will take judicial knowledge of the fact that the population of the city of Bowling Green, Missouri, is 2,650, the population of Louisiana, Missouri, is 4,286 and the city of Clarksville, Missouri, has a population of 638 according to the 1960 Census.

#### CONCLUSION

It is the opinion of this office that the cities of Bowling Green, Louisiana and Clarksville, Missouri, may cooperate with each other in the purchase, construction,



Mr. Lawrence A. Schneider

extension and improvement of industrial plants as provided in Sections 27 and 23a of Article VI of the Constitution of Missouri when the project or plant is within the corporate limits of Clarksville, and that the cities of Louisiana and Bowling Green may cooperate with each other for such purpose when the plant or project is located either within or outside the corporate limits of either of such cities.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, A. Moody Mansur.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

AMM:lt

COUNTIES:  
ORDINANCES:  
ST. LOUIS COUNTY COUNCIL:

Any ordinance defined as an emergency ordinance under Section 18 of the St. Louis County Charter can only be validly enacted by five (5) affirmative votes of the County Council.

Opinion No. 319

August 15, 1963

Honorable John J. Johnson  
Missouri Senate, 15th District  
11001 Eckelkamp Drive  
Affton 26, Missouri



Dear Senator Johnson:

This is in answer to your opinion request addressed to this office dated July 26, 1963. Your letter reads as follows:

"On July 18, 1963, the St. Louis County Council passed Bill 195 which establishes the 1963 rate of taxes to be levied on all the real and personal property in St. Louis County.

"At the time this bill was voted on it received four (4) affirmative and three (3) negative votes. The Chairman of the Council declared it finally passed.

"Section 18 of the St. Louis County Charter provides as follows:

'Emergency ordinances shall require the affirmative vote of not less than five (5) members of the Council and shall take effect immediately upon their enactment. Emergency ordinances shall be those ordinances relating to the following:

'(1) Calling an election or providing for the submission of any proposal to the people;

August 15, 1963

'(2) Appropriations for the support of the County government and the payment of principal and interest on the county's debts;

'(3) Borrowing of funds in anticipation of taxes;

'(4) Fixing tax rates;

'(5) Amendments to the zoning ordinance, provided that a general revision of the zoning ordinance shall not be deemed to be an emergency ordinance;

'(6) The immediate preservation of the public peace, health, safety and welfare, in which ordinance the emergency has been declared.'

"I respectfully request your opinion as to whether this ordinance was validly enacted under the St. Louis County Charter in view of the provisions of Section 18 as set out above.

"If your research reveals that this ordinance was validly enacted, I request your further opinion as to whether this ordinance would then be subject to the referendum provisions of the St. Louis County Charter which are embodied in Articles 17, 77, and 79 thereof.

"By opinion dated July 25, 1963, the St. Louis County Counselor ruled that the above ordinance was validly enacted although this ordinance received the affirmative vote of only four (4) members of the Council.

"You may wish to review the County Counselor's opinion in preparing the opinion requested herein."

As you suggested, we have reviewed the County Counselor's opinion dated July 25, 1963, concluding that this ordinance was validly enacted. We have also reviewed the opinion of former County Counselor Gallagher, dated November 8, 1961, which was

August 15, 1963

mentioned in the July 25, 1963 opinion. It might be noted at the outset that the zoning amendment in issue in the November 8, 1961 opinion was enacted by five members of the Council, so the question here presented was not in issue. Further, Section 18 of the St. Louis County Charter was not mentioned or construed in the November 8, 1961 opinion.

All parts of the Charter must be considered to the end that its real purpose and intent as an entire instrument will prevail. State ex rel. Moore vs. Toberman, 250 SW2d 701,705.

Section 13 of the St. Louis County Charter provides:

" . . .An affirmative vote by a majority of the members of the entire Council shall be necessary to pass any ordinance or resolution except as otherwise provided in this charter."  
(Emphasis added)

Section 17 of the Charter provides:

"All ordinances except emergency measures shall take effect at the expiration of fifteen days after the date said ordinance is enacted, unless a later date therefor be fixed therein; provided, however, that if within ten days after the enactment thereof, there be filed with the County Clerk a notice signed by not less than 500 registered voters of the County stating their intention to cause referendum petitions to be circulated to submit such ordinance or any part thereof to the voters, such ordinance shall, subject to the referendum provisions of this charter, take effect 40 days after the date of its enactment unless a later date be fixed in such ordinance." (Emphasis added)

Thus, the plain purpose of Section 17 in postponing the effective date of a non-emergency ordinance is not to give those concerned a modest time in which to adjust to the new ordinance, but rather to permit the voters time in which to resort to the referendum procedure.

August 15, 1963

Section 18 of the Charter provides:

"Emergency ordinances shall require the affirmative vote of not less than five members of the Council and shall take effect immediately upon their enactment. Emergency ordinances shall be those ordinances relating to the following:

- (1) Calling an election or providing for the submission of any proposal to the people;
- (2) Appropriations for the support of the County government and the payment of principal and interest on the County's debts;
- (3) Borrowing of funds in anticipation of taxes;
- (4) Fixing tax rates;
- (5) Amendments to the zoning ordinance, provided that a general revision of the zoning ordinance shall not be deemed to be an emergency ordinance;
- (6) The immediate preservation of the public peace, health, safety and welfare, in which ordinance the emergency has been declared."  
(Emphasis added.)

Section 77 of the Charter deals with Initiative, Referendum, Recall, and provides,

"The people reserve the power to propose and enact or reject ordinances and amendments to this Charter, independent of the Council, to approve or reject by referendum any ordinance of the Council except emergency measures, and to recall any elective officer."  
(Emphasis added.)



August 15, 1963

Therefore, by the express terms of the Charter the people of St. Louis County, surrendered their right to referendum only for emergency ordinances, and reserved this right of referendum for all other ordinances.

In the situation presented here for an opinion, if the passage of Bill 195 by four (4) council members were a valid enactment, it would of necessity be subject to a referendum under Section 17 of the Charter. Also, under Sections 77 and 79 of the Charter this issue could not be submitted to the voters until the next primary or general election. In this factual situation, the earliest this Bill could be submitted would be August, 1964, or more than a year after consideration by the Council. Necessarily, under this view, the ultimate fate of this Bill may be shrouded in mystery until voted on by the people with consequent intervening fiscal uncertainty.

We also note the confusing situation which would also be presented by making the balance of those ordinances included in Section 18 of the Charter subject to a referendum if passed by a simple majority of the Council.

For example, the action of the Council calling for an election or providing for the submission of any proposal to the people, if passed by only a simple majority of the Council, would be subject to referendum. If the requisite signatures were obtained, the people then would be forced to have an election presenting only the question as to whether they wished to have an election.

The same would logically hold true for the borrowing of funds in anticipation of taxes, appropriation for the support of the county government, and amendments to the zoning. All of these measures would then be referable, with the attendant delay and confusion.

We believe the framers of the St. Louis County Charter never intended this result.

A power of a county under home rule charter to perform functions of local or municipal nature is granted by the Constitution, and is not subject to, but takes precedence over the legislative power of the State. Article IV, Section 18, Constitution of Missouri; Casper v. Hetlage, 359 SW2d 781 (1962). Those cases, therefore, dealing with State legislative procedures cannot be controlling. It is the provisions of the St. Louis County Charter that must be construed. Casper v. Hetlage, supra.

August 15, 1963

As noted above, Section 18 of the Charter provides these "\* \* \* ordinances shall require the affirmative vote of not less than five (5) members of the Council and shall take effect immediately upon their enactment." (Emphasis added.) Section 18 then provides, "Emergency ordinances shall be those ordinances relating to the following\* \* \*." (Emphasis added.) It is not questioned that emergency ordinances must be passed by five (5) members of the Council or that they become effective immediately upon the date of their enactment. In other words, it is not questioned that the term "shall" as used in the first two instances is mandatory, and not merely directory and advisory. Yet, to hold that an ordinance relating to one of the enumerated categories could be validly enacted by four Council members, of necessity, would mean the framers of the Charter when they stated, "emergency ordinances shall be those ordinances relating to the following:" (emphasis added), departed from their former mandatory use of the word "shall" and now intended it to be used in a directory and advisory sense. This would be a distorted construction. In the case of *State v. Carr*, 203 SW2d 670, the Springfield Court of Appeals, in construing the mandatory features of emergency measures applicable to the City of Springfield, noted l.c. 677:

"These provisions are mandatory in form. They are each of the essence of the enactment. If either are mandatory, and not merely directory, then it would seem that they all are."

The St. Louis County Charter, by its plain language, provides three qualities peculiar to certain ordinances: (1) They become effective immediately; (2) They must fall within one of the enumerated categories; and (3) They must be passed by five Council members.

The only limitations on the mandatory features of Section 18 are expressed in the Section itself. Subparagraph 5 provides that a general revision of the zoning ordinance should not be deemed to be an emergency ordinance. Subparagraph 6 provides that the ordinances for the immediate preservation of the public peace, health, safety and welfare, must declare the emergency. It must be, then, that all other named categories in Section 18 are deemed to be emergency by definition. This being true, they must require affirmative votes by 5 members of the Council in order to be validly enacted.

August 15, 1963

The Supreme Court of Missouri, en Banc, in the case of State ex rel. Asotsky et al. v. Regan, 298 S.W. 747, expressly recognized the impracticability of having tax measures subject to a referendum. In that case a taxpayer in Kansas City sought to hold a referendum on an occupation tax passed by the City Council. The Kansas City Charter at that time provided that such measures were emergency measures and immediately effective. The Supreme Court of Missouri held that such a measure was not subject to a referendum, and notes: 298 S.W. 747 l.c. 749

"While we have no right to construe a law by our view of its expediency, we can take that feature into consideration in attempting to ascertain what was in the legislative mind. Kansas City would be in severe financial straits if every occupation tax could be held up by referendum." (Emphasis added.)

Further support for this view is found in a concurring opinion of Judge Eager joined by Judge Leedy in the case of State v. Donohue, 368 SW2d, 432, decided June 4, 1963, which construed the St. Louis County Charter.

In that case the St. Louis County Council adopted an amendment to the zoning ordinance. The issue presented was the right of the people to propose by initiative an amendment seeking to repeal this ordinance. The majority opinion held that the petitioners had not followed the correct technical initiative procedure set up in the Charter, and it was therefore not allowed. Judge Eager, joined by Judge Leedy, of the Missouri Supreme Court concurred in the result but felt that the use of the initiative procedure was the equivalent of a referendum and noted a referendum was not allowed under the St. Louis County Charter for any amendment to the zoning ordinances. Judge Eager stated l.c. 439:

"I would prefer to put this holding upon the basic fact that the respondents are attempting to accomplish by indirection that which they are specifically prohibited from doing directly; that is to say, they may not create any amendment to the zoning ordinance by referendum, but in fact and in substance they are here seeking a referendum upon the enactment of the prior ordinance. I would doubt that any zoning amendment may be accomplished by initiative."

Honorable John J. Johnson #8

August 15, 1963

We find no conflict in the provision of Section 18 requiring a vote of five (5) Council members for amendments to the zoning ordinance, and Section 58 of the Charter which provides that:

"No ordinance relating to zoning, which is contrary to the recommendation of a majority of the members of the Planning Commission shall be adopted by the Council except by an affirmative vote of five members of the Council."

These two sections are not equivalent, in that Section 58 refers to all ordinances related to zoning and Section 18 designates only those ordinances amending the zoning ordinance.

It must be, then, that the framers of the St. Louis County Charter intended that only those measures designated by Section 18 as "emergency measures" have the quality of being nonreferable. The people of St. Louis County surrendered their right of referendum in exchange for a mandatory 5 affirmative votes in the enumerated classes of ordinances contained in Section 18.

#### Conclusion

In answer to the question propounded in your opinion request, it is the opinion of this office that this ordinance could only be validly enacted by five (5) affirmative votes of the County Council.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Robert D. Kingsland.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

RDK:df;bj

TAXATION:  
FRANCHISE TAX REPORTS:  
SECURITY OF TAX RETURNS:  
STATE TAX COMMISSION:  
INSPECTION OF TAX  
RETURNS:

Section 147.110, paragraph 3, RSMo 1959, which prohibits the state tax commission, its officers and employees and all other officers and employees of the state from divulging or making known the information contained in a franchise tax report does not prohibit the commission from permitting the taxpayer, acting through a duly authorized officer or agent from inspecting or obtaining a copy of its own report theretofore filed.

September 9, 1963

Opinion No. 321  
(Nessenfeld)

State Tax Commission  
Jefferson Building  
Jefferson City, Missouri

Gentlemen:

You have requested our opinion as follows:

"This commission requests an official opinion from your department respecting the provisions of Section 147.110 (3), RSMo., 1959, specifically advising to whom, if anyone, the commissioners or any officer or employee of the commission may divulge or make known the information, or any part thereof, contained in the corporation franchise tax report to this commission under Section 147.020, RSMo., 1959."

To the extent relevant to your request, Section 147.110, paragraph 3, RSMo 1959, provides:

"It shall be unlawful for any member of the state tax commission or for any officer or employee of such commission, or for any other officer or employee of the state \* \* \* to divulge or make known in any manner not provided by law any \* \* \* report made under this chapter."

Section 147.020, RSMo 1959, provides for a report from every corporation liable to the franchise tax. This section requires that such report shall contain certain specified information relating to the corporation and its business, including the market value of its property and assets, the amount of





its liabilities and its balance sheet. Much of this information which is required to be reported is of a nature which many corporations would deem confidential and not to be disclosed publicly.

The prohibitory provisions of Section 147.110, paragraph 3, evidence and declare a public policy to make the information contained in franchise tax returns confidential and privileged. The policy therein declared is to encourage the full, frank and truthful disclosure of information to the commission by insuring to the reporting corporations that the information furnished will be held in confidence. In clear and unambiguous language, this section prohibits the commission and the public officers and employees therein set forth from disclosing the contents of a franchise tax report or any part thereof in any manner not provided by law.

It is our opinion, however, that the prohibition against such disclosure is not intended to and does not bar the commission or its officers or agents from permitting an authorized officer or agent of the taxpayer itself acting on behalf of the taxpayer to inspect a franchise tax report which was filed by said taxpayer or to obtain a copy thereof. The language used in the statute simply makes it unlawful "to divulge or make known" the report. We do not believe it can reasonably be said that by permitting the taxpayer to see or obtain a copy of its own report, the commission is thereby "divulging" information.

In Webster's New International Dictionary, Second Edition, the word "divulge" is defined as follows:

"To make public; to reveal or communicate to the public; to tell (a secret) so that it may become generally known; to disclose; --said of that which had been confided as a secret, or had been before unknown."

Every statute must be construed to accord with the obvious legislative intent and to effectuate the manifest legislative policy. We can discern no purpose or policy in the statute to require the commission to withhold from the corporation which filed the return and which not only knew but was the very source of the information, the right to see and examine its own report. Nothing is thereby "divulged" or "made known" in the obvious sense in which those words are used in the statute. Nothing

is made public. No confidence is violated. No secret is revealed. Certainly the corporation itself cannot be harmed by being permitted to see and examine its own report.

The commission must, of course, take care that the information is given only to the taxpayer itself. To this end, it is our opinion that the request for such information must be made in the name and on behalf of the reporting corporation by some officer or agent duly authorized to act on its behalf at the time the commission is requested to make the disclosure. The mere fact that a particular individual may have signed the return at the time it was filed would not necessarily be sufficient to authorize him to see the report or obtain a copy thereof. This is true because the information is not furnished to such person but to the corporation itself, and such person may no longer be an agent of or authorized to act on behalf of the corporation.

#### CONCLUSION

It is the opinion of this office that Section 147.110, paragraph 3, RSMo 1959, which prohibits the state tax commission, its officers and employees and all other officers and employees of the state from divulging or making known the information contained in a franchise tax report, does not prohibit the commission from permitting the taxpayer, acting through a duly authorized officer or agent, from inspecting or obtaining a copy of its own report theretofore filed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:SR

(Opinion #322 answered by letter)  
Eagleton

August 5, 1963



Honorable Thomas A. Walsh  
State Representative  
Room 314, Capitol Building  
Jefferson City, Missouri

Dear Representative Walsh:

We have your letter of July 19, 1963, which reads as follows:

"I notice that a suit has been filed in Federal District Court in St. Louis challenging the constitutionality of the method of apportionment of the Missouri House of Representatives.

"This suit, as I gather it, is similar in nature to suits filed in many states following the 1962 opinion of the Supreme Court of the United States in Baker vs. Carr.

"I realize that since you as Attorney General will defend the Governor and the Secretary of State in the above-mentioned lawsuit that you cannot at this time detail any opinions which might be involved in that suit.

"However, in this general area of legislative reapportionment, I have two questions which I feel you may well be in a position to answer easily.

"#1. Under Art. III, Secs. 49, 50, and 53 of the 1945 Missouri Constitution, assuming that all of the technical procedures are followed, can a constitutional amendment be submitted by the initiative method which would change the method of apportionment of the Missouri House of Representatives?

August 5, 1963

#2. Baker vs. Carr, as I understand it, was a case out of Tennessee. Was there available to the citizens of Tennessee any type of initiative procedure by which the citizens of the state could amend the Tennessee State Constitution?"

Our answer to Question #1 is Yes. Our system of legislative apportionment as set out in the 1945 Constitution in Art. III, Secs. 2 and 3 can be amended by the initiative process just as other portions of our Constitution can be amended by the same process.

Our answer to Question #2 is No and I quote in full footnote 14 of the opinion of the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962).

"The appellants claim that no General Assembly constituted according to the 1901 Act will submit reapportionment proposals either to the people or to a Constitutional Convention. There is no provision for popular initiative in Tennessee. Amendments proposed in the Senate or House must first be approved by a majority of all members of each House and again by two-thirds of the members in the General Assembly next chosen. The proposals are then submitted to the people at the next general election in which a Governor is to be chosen. Alternatively, the legislature may submit to the people at any general election the question of calling a convention to consider specified proposals. Such as are adopted at a convention do not, however, become effective unless approved by a majority of the qualified voters voting separately on each proposed change or amendment at an election fixed by the convention. Conventions shall not be held oftener than once in six years. Tenn Const, Art II, section 3, Acts of 1951, c.130, section 3, and Acts of 1957, c. 340, section 3, provided that delegates to the 1953 and 1959 conventions were to be chosen from the counties and floterial districts just as are members of the State House of Representatives. The General Assembly's call for a 1953 Constitutional Convention originally contained a provision 'relating to the appointment (sic) of representatives and Senators' but this was excised. Tenn HJ, 1951, 784. A Resolution introduced at the 1959 Constitutional Convention and reported unfavorably by the Rules Committee of the Convention was as follows:

'By Mr. Chambliss (of Hamilton County), Resolution No. 12- Relative to Convention considering reapportionment, which is as follows:

'WHEREAS, there is a rumor that this Limited Convention has been called for the purpose of postponing for six years a Convention that would make a decision as to reapportionment; and

Honorable Thomas A. Walsh -

3.

August 5, 1963

'WHEREAS, there is pending in the United States Courts in Tennessee a suit under which parties are seeking, through decree, to compel reapportionment; and

'WHEREAS, it is said that this Limited Convention, which was called for limited consideration, is yet a Constitutional Convention within the language of the Constitution as to Constitutional Conventions, forbidding frequent Conventions in the last sentence of Article Eleven, Section 3, second paragraph, more often than each six years, to-wit:

"No such Convention shall be held oftener than once in six years."

'NOW, THEREFORE, BE IT RESOLVED, That it is the consensus of opinion of the members of this Convention that since this is a Limited Convention as hereinbefore set forth another Convention could be had if it did not deal with the matters submitted to this Limited Convention.

'BE IT FURTHER RESOLVED, That it is the consensus of opinion of this Convention that a Convention should be called by the General Assembly for the purpose of considering reapportionment in order that a possibility of Court enforcement being forced on the Sovereign State of Tennessee by the Courts of the National Government may be avoided.

'BE IT FURTHER RESOLVED, That this Convention be adjourned for two years to meet again at the same time set forth in the statute providing for this Convention, and that it is the consensus of opinion of this body that it is within the power of the next General Assembly of Tennessee to broaden the powers of this Convention and to authorized and empower this Convention to consider a proper amendment to the Constitution that will provide, when submitted to the electorate, a method of reapportionment.' Tenn. Constitutional Convention of 1959, The Journal and Debates, 35, 278. (Emphasis supplied.)

Yours very truly,

THOMAS F. EAGLETON  
Attorney General



OPINION NO. 327 ANSWERED BY  
October 9, 1963 LETTER

Honorable Smith N. Crowe  
Chairman, Industrial Commission  
State Office Building  
Jefferson City, Missouri



Dear Sir:

This letter is in response to your request dated August 6, 1963, for an opinion on the discarding of certain files of the Industrial Commission.

At our request, you have supplemented your request by specifying the particular files you desire destroyed as follows:

- "1. Awards and Orders issued in Workmen's Compensation cases from 1946 to the present time.
2. Prevailing Wage Special Determinations and General Wage Orders from 1957 to the present time.
3. Employment Security Decisions of the Industrial Commission from 1946 to the present time.
4. Requisitions for the Payment of Purchases from 1949 to the present time.
5. Expense Accounts from 1949 to the present time.
6. Duplicate copies of the above items."

This office has recently issued its opinion No. 256, dated October 4, 1963, to William L. Wyss, relating to this general subject matter. This opinion discusses the controlling principles of law, and we are enclosing a copy for your information.

Honorable Smith N. Crowe

#2

We have found no statutes which authorize the Industrial Commission to destroy public records of that Commission. However, the general statutes relating to public records and to the microfilming and disposition thereof, as provided in Sections 109.120 and 109.140, as amended by the Laws of 1963 in House Bill No. 142, are applicable to the Industrial Commission as discussed in the aforesaid opinion No. 256.

It is therefore the view of this office that items numbered 1 to 5, inclusive, above mentioned, may not be destroyed or other disposition made thereof except as provided in Sections 109.120 and 109.140, as amended by the Laws of 1963.

With respect to item numbered 6, referred to above, relating to duplicate copies of the foregoing items, it is the opinion of this office that such duplicate copies may be destroyed or otherwise disposed of so long as the originals remain intact and preserved in your files.

Yours very truly,

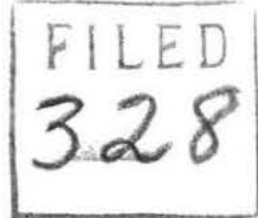
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THOMAS F. EAGLETON  
Attorney General

JGS:ml  
Enc.

Opinion No. 328 answered  
by letter (Northcutt)

October 29, 1963



Honorable Haskel Holman  
State Auditor  
Capital Building  
Jefferson City, Missouri

Dear Mr. Holman:

In answer to your request of August 8, 1963, for the opinion of this office as to the propriety of one individual holding simultaneously the position of secretary and treasurer of a special benefit road district, it is the opinion of this office that there is no conflict between these two offices and, therefore, they may be held simultaneously.

It is assumed in the above paragraph that a person other than a commissioner is secretary and treasurer in said district. The statute, Section 233.335, does authorize a commissioner to be secretary but fails to authorize a commissioner to be treasurer, and the common-law prohibition against a person holding an office subordinate to another office he holds is applicable here, and would prohibit a commissioner from holding the position of treasurer of the special benefit road district since the one person as commissioner would be approving his own bond, and further he, as commissioner, would be auditing and approving his own books as treasurer.

I am enclosing copy of opinion No. 188-1963 to the Hon. Ruben A. Schapeler, Bates County, Missouri, which fully sets out the restrictions in this type of situation.

In answer to your second question concerning the permissibility of payments to a secretary and treasurer of a

Honorable Haskel Holman - 2 -

special benefit road district of compensation for services performed, it is our opinion that this payment should not be made. The statute providing for these offices provides no compensation therefor and, as a general rule, when there is an office set up and no compensation provided in enabling legislation, the rendering of the services of said office are deemed to be gratuitous.

I am enclosing a copy of an opinion of November 17, 1954, to the Hon. E. W. Bennett, Prosecuting Attorney, Salem, Missouri, on this very problem, which I feel will help you more fully understand the situation.

This opinion is limited to the specific type of special benefit assessment districts about which you have inquired; in other words, benefit assessment road districts in township organization counties organized under Sections 233.320 through 233.445.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

RRN:sr

Enclosures - 2

September 17, 1963



Honorable Gerald Kiser  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Mr. Kiser:

On August 8, 1963, you requested an opinion of this office concerning the election of county committeemen and committeewomen in Clay County, Missouri. Since then, Representative Wendell D. Rosenbaugh of the First District of Clay County made a request of this office concerning a similar question and other questions. Therefore, I took the liberty of combining your request with the request from Representative Rosenbaugh and, as his opinion request contained other questions, I combined it into one opinion addressed to Representative Rosenbaugh.

(#249, 1963)

I am enclosing a copy of this opinion, which held in reference to your question:

"1). The provisions of Section 120.770, RSMo 1959, may refer to any city divided into wards if the county court sees fit to divide the township in which the city is located into election districts with boundaries coincident with the ward boundaries. A village is not a city under the Missouri statutes, hence the above opinion does not refer to villages so divided into wards even if such ward boundaries coincide with election district boundaries;"

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

Enc.



(answered by letter, #333)  
Siddens

January 22, 1963



Honorable Milton Carpenter  
" Charles Trigg  
" Thomas C. Dunne

Gentlemen:

Please be advised on January 22, 1963, the Missouri House of Representatives voted Articles of Impeachment in connection with Circuit Judge Virgil A. Poelker.

Sec. 106.050, RSMo 1959 reads as follows:

"If any officer shall be impeached, he is hereby suspended from exercising his office, after he shall be notified thereof, until his acquittal."

In Blackwell v. City of Thayer, 74 S.W. 375 the St. Louis Court of Appeals wrote:

"Blackwell's suspension being legal, it follows by force of the decisions first cited, that he was not entitled to a salary during his suspension, as an officer lawfully relieved from the duties of his office ceases to earn a salary."

Therefore, pursuant to this decision, Judge Poelker is not entitled to and should not be paid any salary after the date of his impeachment, namely, January 22, 1963.

Yours very truly,

Thomas F. Eagleton  
Attorney General

(This was answered by Mr. Siddens  
and had not gone through records  
book. Copy made & indexed on 8/13/63  
L.L.)

EFFECTIVE DATE OF LAWS:  
LAWS - EFFECTIVE DATE:  
SUNDAY CLOSING:  
BLUE LAW:  
NUISANCE:  
STATUTES:  
CRIMINAL LAW:

- (1) Effective date of new Sunday Closing law is Oct. 13, 1963 and there exists no reason why it should not be enforced as of that date
- (2) In addition to criminal sanctions imposed by the law, a prosecuting attorney has the authority to seek a civil injunction to enjoin illegal Sunday selling as a public and common nuisance.
- (3) A private party may sue to abate such nuisance if he has suffered some peculiar or special injury not common to the general public.

August 13, 1963

*Mined copies in vault*  
OPINION NO. 335

Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County  
Courthouse  
Forsyth and Central Boulevards  
Clayton 5, Missouri



Dear Mr. O'Brien:

You have requested an opinion with respect to Senate Bill No. 49 as finally enacted (the Sunday Closing law):

- (1) As to whether there is any reason why said law should not be enforced on and after October 13, 1963, the effective date; and
- (2) As to what civil remedies, if any, Section 1(4) of the Act makes available to prosecuting attorneys or aggrieved private parties.

In response to your first question, the effective date of the Sunday Closing law is October 13, 1963, ninety days after the adjournment of the General Assembly on July 15, 1963 (Missouri Constitution of 1945, Article III, Section 29, and Section 1.130, RSMo 1959). There is not only no reason why the law should not be enforced on and after such date, but it would appear to be the duty of the officials charged with enforcement of the laws of the State of Missouri to do so. Indeed, in a case filed against you in the Circuit Court of St. Louis County as a test of the validity of the law, Circuit Judge Schaaf held it to be constitutional (GEM, INC., et al. v. O'BRIEN).

Concerning your second inquiry, in addition to criminal proscriptions provided by Section 1(1) of the law, Section 1(4) thereof makes its violation a public and common nuisance.

Honorable Daniel V. O'Brien

The courts of Missouri have, without exception, held it to be permissible for the Legislature to declare an act a public nuisance, in addition to proscribing such act as a crime. In *State v. Tower*, 185 Mo. 79, 84 SW 10 (1904), the court found:

"The power of the General Assembly to pass all needful laws except when restricted by the State or Federal Constitution is plenary, and the Legislature has the power to declare places or practices to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. The General Assembly in the exercise of the police power may declare that a nuisance which before was not a nuisance.

"Such an act is properly within that power which is conferred by the Constitution of this State upon the General Assembly in the distribution of the powers of our State government. [*Lawton v. Steele*, 119 N.Y. 226; *Mugler v. Kansas*, 123 U.S. 623; *Mathews v. Railroad*, 121 Mo. 298; *Moses v. United States*, 50 L.R.A. 532.]

"Because at common law smoke was not a nuisance per se is no reason why the people of this State, through their representatives in the legislative department, may not change that law, and make it a nuisance per se when the location and surrounding circumstances in their opinion and judgment require it. The General Assembly may adopt new regulations from time to time as the occasion and necessity may require. The State has no higher function than the duty to provide for the safety and comfort of its citizens."

It is the duty of the prosecuting attorney or other officials charged with law enforcement to bring suit, in the name and at the relation of the State, to enjoin the commission of such public nuisance. *State ex rel. Thrash v. Lamb*, 237 Mo. 437, 141 SW 665 (1911).

Honorable Daniel V. O'Brien

In State ex rel. Lamm v. Sedalia, 241 SW 656 (K.C. Ct. of App. 1922), the court, citing Thrash, supra, stated:

"The prosecuting attorney can properly represent the public in the bringing of a suit to restrain a public nuisance within his jurisdiction, for he has powers analogous to those exercised by the Attorney General of England. \* \* \* and a court of equity has jurisdiction to restrain a public nuisance by injunction at the suit of the state or some proper officer representing the state."

Further, a private party may sue to abate such nuisance if he has suffered some peculiar or special injury not common to the general public; that is, different in kind rather than degree from the public injury. Cummings Realty & Investment Co. v. Deere & Co., 208 Mo. 66, 106 SW 495 (1907). In Christy v. C. B. & Q. R.R. Co., 240 Mo. App. 632, 212 SW2d 476 (K.C. Ct. of App. 1948), the court, citing Cummings, supra, stated:

"In order to maintain an action for the nuisance it is not enough for the property owner to show that his injury is merely greater in degree than that suffered by the general public. His damage must be different in kind."

Again, in Missouri Veterinary Medical Assn. v. Glisan, 230 SW2d 169 (St. Louis Ct. of App. 1950), the court cites both the foregoing cases in support of the proposition that:

"A public nuisance cannot be restrained by a suit of an individual suffering no special injury from it."

Of interest in determining what constitutes a sufficient special interest are the cases of Clutter v. Blankenship, 346 Mo. 961, 144 SW2d 119 (1940), and Biggs v. Griffith, 231 SW2d 875 (Springfield Ct. of App. 1950).

Honorable Daniel V. O'Brien

CONCLUSION

(1) The effective date of the new Sunday Closing law is October 13, 1963 and there exists no reason why it should not be enforced as of that date.

(2) In addition to the criminal sanctions imposed by the law, a prosecuting attorney has the authority to seek a civil injunction to enjoin illegal Sunday selling as a public and common nuisance.

(3) A private party may sue to abate such nuisance if he has suffered some peculiar or special injury not common to the general public.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

\_\_\_\_\_  
THOMAS F. EAGLETON  
Attorney General

JGS:ml



INSURANCE: Articles of Incorporation of Progressive Security  
Life Insurance Company.

OPINION NO. 336

August 20, 1963



Honorable Jack L. Clay, Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Clay:

Receipt is acknowledged of your letter of August 12, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Progressive Security Life Insurance Company, which Declaration of Intention also included a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959. Also forwarded with your request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JLO:df

COUNTY COLLECTOR:  
COUNTY OF THIRD CLASS:  
COMMISSIONS:

- 1) A collector of a county of the third class with a population of over 40,000 is not required by Section 52.120, RSMo 1959, to maintain a branch office.
- 2) The additional compensation for maintaining such branch office as provided by Section 52.140, RSMo 1959, does not apply to counties of the third class with a population of over 40,000.

**September 16, 1963**

OPINION NO. 338

To the Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri



Dear Mr. Holman:

On August 12, 1963, you requested the opinion of this office in a letter which reads as follows:

"Several questions have arisen in the process of an audit of a county of the third class with a population in excess of forty thousand inhabitants on the basis of the 1960 census report as to the applicability of Section 52.120 R.S. Mo., 1959, together with a need for clarification of Section 52.140 R.S. Mo., 1959.

"I hereby request and will appreciate your official opinion relative to the following questions:

"1. Is a county collector in a county of the third class with a population in excess of forty thousand inhabitants, as determined by the 1960 decennial census, required or authorized to maintain a branch office under the provisions of Section 52.120 R.S. Mo., in a city of over fifteen thousand population and in which city there is a Court of Common Pleas?

"2. Would the collector of such county be entitled to the additional commission, as provided by Section 52.140, for maintaining the branch office after the population of the county exceeded forty thousand?"

Honorable Haskell Holman

In answer to your first question it is necessary to look to the language of Section 52.120, R. S. Mo. 1959, which states:

"In all counties of the third class in this state that may now or hereafter have a population of twenty-five thousand and less than forty thousand, and in which there is a city of over fifteen thousand population, and in which said city there is a courthouse more than seven miles distant from the courthouse in the county seat, and in which said courthouse in said city there are held regular and legally established terms of court of common pleas, it shall be the duty of the collector of the revenues of such county to maintain in addition to his office at the county seat a branch office in the courthouse located in the said city of fifteen thousand population or more, for the convenience of the taxpayers of said county living within the jurisdiction of said court of common pleas."

[Emphasis ours]

The language of the statute in the underlined portion clearly shows that the Legislature intended that the statute be expressly limited to only those counties of the third class with more than twenty-five thousand and less than forty-thousand population. Therefore, the provision requiring maintenance of a branch office does not extend to counties of the third class whose population exceeds forty thousand.

Section 52.140 R.S. Mo. 1959, reads as follows:

"In all such counties where the collector of the revenue is required by section 52.120 to maintain a branch office as provided in section 52.120, he shall be allowed to retain, in addition to the amount now authorized by law, three-fourths of one per cent of all taxes collected to cover the additional expense of maintaining such branch office."

The underlined portion shows that the additional commission is allowed only where Section 52.120, supra, requires the

Honorable Haskell Holman

branch office to be maintained. Since Section 52.120, supra, does not require maintenance of a branch office in counties of a third class with population over forty thousand, the collector may not retain the additional three-fourths of one per cent commission on all taxes which Section 52.140, supra, authorizes.

#### CONCLUSION

It is the opinion of this office that a collector of a county of the third class with a population of over forty thousand is not required by Section 52.120 R. S. Mo. 1959, to maintain a branch office. Further, the additional commission for maintaining such branch office as provided by Section 52.140 R.S. Mo. 1959, does not apply to counties of the third class with a population of over forty thousand.

The foregoing opinion, which I hereby approve was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JDF:df

BARBERS.  
BOARD OF BARBER EXAMINERS:  
ADMINISTRATIVE AGENCIES:

Board of Barber Examiners should permit applicants for registration who do not read or write English to use interpreters during written examination. Board may impose reasonable requirements so as to preserve the integrity of examination.

Opinion No. 339

September 30, 1963



Mr. Leon F. Burton  
Secretary-Treasurer  
State Board of Barber Examiners  
131 Capitol Building  
Jefferson City, Missouri

Dear Mr. Burton:

This is in response to your recent request for an opinion of this office, which request reads as follows:

"Before a person can become licensed to practice barbering in this state, he must first pass both a written and practical examination given by this Board.

"At times we have applicants, usually foreigners, who can neither read nor write the English language.

"We would like your opinion as to whether or not we are required by law to permit such applicants to have interpreters."

A search of the statutes relating to the examination of applicants for registration as barbers in this state fails to shed any direct light upon your inquiry. However, it is clear that the content and mode of giving the examination is left largely to the Board within the broad guidelines set out by the statutes. See Sections 328.070 and 328.080, RSMo 1959. For example, there is no specific requirement that the examination be in whole or in part in writing; and the Board could, if it so desired, administer such examinations orally.

However, it is clear that upon a showing of qualifications to take the examination and the filing of the required



Mr. Leon F. Burton

fee, an applicant has the right to be examined. Section 328.080, RSMo 1959. Since the statutes relating to the examination and, indeed, the practice of barbering do not require any degree of facility with the English language, it must be concluded that the applicant's right to be examined is not contingent upon his knowledge of English.

Consequently, it is our opinion that an applicant who cannot read or write English should be permitted to have an interpreter to assist him in the examination. The Board may and should exercise stringent controls over the use of interpreters to insure that it is the applicant and not the interpreter who is taking the examination. To this end, the Board could properly establish a list of approved interpreters and require that any interpreter employed to assist in an examination be selected from that list. The means which the Board uses are, of course, entirely up to the Board; but we believe that the principle remains that the Board should examine all applicants who possess the statutory qualifications and, where necessary, permit the use of interpreters.

#### CONCLUSION

It is, therefore, the opinion of this office that the State Board of Barber Examiners should permit applicants for registration who do not read or write the English language to have interpreters present during such parts of the examination as required by such applicants, and further that the Board may impose any reasonable requirements as to the character, honesty and other qualifications of the interpreters that it seems necessary to preserve the integrity of the examination.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

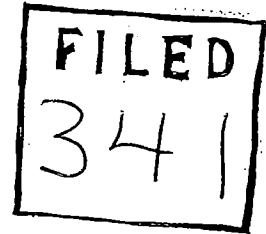
AJS:lt

CORPORATE EXISTENCE:  
FARMERS MUTUAL INSURANCE COMPANY:  
MUTUAL INSURANCE COMPANY  
INSURANCE:  
REVIVAL OF CHARTERS:

Farmers Mutual Insurance Company  
may not receive its corporate  
existence after expiration of  
charter by limitation.

FILED 341

November 1, 1963



Honorable Warren E. Hearnes  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Hearnes;

Your recent request for an opinion of this office  
reads as follows:

"On January 31, 1912, Articles of Incorporation were filed with this office incorporating the above mentioned Mutual Insurance Company under Section 7154, R. S. Mo. 1909. Article Three of the Articles of Incorporation set out that the corporation should continue for a period of fifty years unless sooner dissolved.

"No amendment was filed extending the corporate duration; therefore, its charter expired by limitation January 31, 1962. Subsequent to that date the attorney for the corporation expressed a desire to revive the corporate charter and extend its duration. This office can find no statutory provision authorizing the same or specifying the procedure.

"Therefore, this writer respectfully requests the opinion of the Attorney General's Office as to whether or not a Farmers Mutual Insurance Company may revive its corporate existence and extend its corporate charter after its charter has expired by limitation as set forth in its Articles, and if so, what procedure should be used."

It is well settled that corporations are creatures of statute and possess only the rights and powers permitted by

Honorable Warren E. Hearnnes

the Legislature. A corporation which lets its charter expire by limitation ceases to exist. Bradley v. Reppell, 133 Mo. 545, 32 SW 645; Park Company v. Gibson, 268 Mo. 394. In order to revive such dead corporation, it is necessary for a statute to exist granting such power.

We concur in your finding that there is no statute authorizing the revival of a Farmers Mutual Insurance Company's corporate existence after expiration. See Sections 380.479 to 380.840, RSMo 1959. Nor was any authority for such revival found in the Provisions Applicable to All Insurance Companies, Chapter 375, RSMo 1959.

The General and Business Corporations Act, Chapter 351, RSMo 1959, does provide such a procedure for revival of an expired corporation in Section 351.542, RSMo 1959, but the applicability of this statute to insurance companies is negated by Section 351.690, RSMo 1959, which provides in pertinent part:

"The provisions of this chapter shall be applicable to existing corporations as follows:

"(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law:

"(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, buildings and loan associations, savings bank and safe deposit companies, mortgage loan companies and nonprofit corporations;"

#### CONCLUSION

Therefore, it is the opinion of this office that a Farmers Mutual Insurance Company may not revive its corporate existence after expiration of its charter by limitation as

Honorable Warren E. Hearnes

set forth in its articles, as no statute exists empowering it to do so.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JDF:df

September 4, 1963



Representative Kenneth J. Rothman  
Suite 203 - Carondelet West  
7730 Carondelet Avenue  
Clayton 5, Missouri

Dear Mr. Rothman:

Pursuant to our telephone conversation yesterday, your opinion request of August 15th is being marked as withdrawn and recorded in our files as such.

As I stated to you in connection with House Bill No. 83, providing for the new weight and license fee requirements of motor vehicles, that the enactment of said bill will have no effect until the 1964 licenses are due for property carrying commercial motor vehicles operating under the provisions of Section 304.190. As the previous section, which was Section 301.060, had a license fee of \$235.00 for said vehicle, which permitted it to carry over 60,010 pounds, and a vehicle having purchased said license, if it complied with the provisions of the axle weight law, which is 304.190, could carry any weight it wished to.

I have taken the liberty of conferring with Fred Howard on this matter, and also have conferred with Captain Whitecotton of the Missouri State Highway Patrol, and they have both assured me that property carrying commercial motor vehicles operating under the provisions of Section 304.190, properly licensed under the old 301.060, and complying with the above requirements, will not be bothered while in their licensed territory which, as I understand it, includes a territory within two miles of the city limits.

Hoping that the above information in addition to our conversation yesterday answers your inquiry, I remain

Yours very truly,

ROBERT R. NORTHCUTT  
Assistant Attorney General

RRN:sr



September 20, 1963



Honorable Lewis B. Hoff  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Mr. Hoff:

This letter is in response to yours of August 19, 1963, requesting any previously rendered opinions of this office or other information regarding the leasing or renting of county or township nursing homes under Section 205.375(4), RSMo 1959. Particularly, you inquire who would qualify as a non-profit organization and how the facilities could be leased under that Section.

As you are aware, Section 205.375 is of recent origin (Laws 1957, p. 689). The statute has not reached the courts for interpretation nor has this office rendered an opinion concerning this legislation.

Section 205.375(4), under inquiry here, provides as follows:

"4. The county courts or township boards may provide for the leasing and renting of the nursing homes and equipment on the terms and conditions that are necessary and proper to nonprofit organizations for the purpose of operation in the manner provided in subsection 1."

As to how the facilities shall be leased or rented: "Section 205.375(4) grants the county courts or the township boards the discretion as to the terms and conditions upon which the facilities shall be leased or rented as long as such lease or rental is to a non-profit organization and on terms consistent with the statute."

As to who would qualify as a non-profit organization: Certainly where the legislature has professed a policy by specifically prescribing the method and terms of creating a non-profit organization, that organization should qualify as a non-profit organization under Section 205.375(4). Missouri Statutes provide for two types of non-profit corporations, viz., benevolent associations under Chapter 352 and not-for-profit corporations under Chapter 355. Corporations organized under either Chapter 352 or 355 would qualify as a "non-profit organization" under Section 205.375(4).

Note, however, Section 205.375(4) does not use the term "non-profit corporation" but rather the term "non-profit organization". Accordingly, lease or rental of nursing home facilities is not restricted to incorporated organizations. Organizations other than corporations may qualify under Section 205.375(4).

Conceivably, there are innumerable variations of non-profit type organizations other than corporations. It is therefore imprudent, if not impossible, to forecast en masse which of such organizations may or may not qualify under Section 205.375(4). Rather, the determination must await the particular facts and be made upon a case-by-case basis.

We hope the above commentary will be of assistance to you and the people of Cedar County, Missouri, in providing for the operation of the El Dorado Springs and Stockton Nursing Homes.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

LD:lt

September 19, 1963



Honorable Joseph T. Conlon, Jr.  
Prosecuting Attorney  
Lincoln County  
Troy, Missouri

Dear Mr. Conlon:

This is in response to your request for an opinion from this office as to whether you can authorize the destruction of photostatic reproductions of hospital records under the five year limitation contained in Section 109.150.

You indicate correctly that Section 109.140, et seq., states that photostatic copies of original documents may be kept in lieu of the originals and the originals may be destroyed.

Section 109.150 does authorize the destruction of certain specified records after a five-year period elapses. However, none of the records listed would appear to include hospital records such as those about which you inquire. We believe that it is a generally accepted principle of law that a public officer having charge of records which are required to be maintained has no implied authority to destroy such records and, in fact, the burden is on the public officer involved to point to some specific authorization in the statutes for such destruction. See 45 Am. Jur., Records, Section 12, page 425.

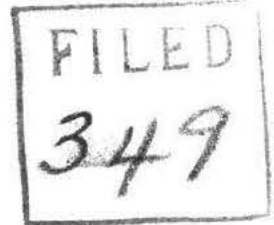
Therefore, it is our conclusion that there is no express or implied authority to destroy the photostatic copies of the records about which you inquire.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

October 31, 1963



Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri

Dear Mr. Burlison:

We have your opinion request of August 20, 1963, in which you asked the question as to whether the County Court has the power to set a general policy with respect to vacations and sick leave of county officials, their deputies and assistants which, when promulgated, would be applicable to and mandatorily binding upon all such officials of the county?

With respect to the power of a County Court, the Supreme Court of Missouri set forth as follows the following principle in the case of King v. Maries County, 249 SW 418, 420:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. \* \* \* This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted."

We have examined the statutes and do not find any which expressly or impliedly would grant authority to the County Court to establish such a policy.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

TFE:oh

(Northcutt)

September 4, 1963



Honorable John D. Mitchell  
Prosecuting Attorney  
Buchanan County Courthouse  
St. Joseph, Missouri

Dear Mr. Mitchell:

We have received your opinion request of August 21, 1963, which reads as follows:

"I have been requested to ask for an opinion from you as to whether House Bill #45, An Act relating to debts and debtors, with a penalty provision, relates to corporations as well as natural persons."

I have studied this bill at length and also the statutes of the State of Missouri which would have a bearing upon this Act and several cases which I think are pertinent thereto. In answer to your specific question, it is to be noted that Section 1.020, RSMo 1959, provides in part as follows:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof: \* \* \*

"(7) The word 'person' may extend and be applied to bodies politic and corporate and to partnerships and other unincorporated associations; \* \* \*"

Also, it is noted that Section 1.030 provides in part as follows:

"2. When any subject matter, party or person is described or referred to by words importing



the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

It may, therefore, be seen from the above that it is the intention of our Legislature that corporate bodies shall be included within the word "person" as used in House Bill No. 45, Seventy-second General Assembly.

Further, in reading House Bill No. 45 of the Seventy-second General Assembly, it is manifest that the Legislature would not have intended to prohibit debt adjusting by an individual and continue to allow debt adjusting by a corporation. An interpretation of this Act to exclude from the meaning of the term "any person" a corporation would be to pervert beyond reasonableness the intent of this bill.

To substantiate our thoughts on this matter that a corporation as far as this bill is concerned is considered a "person," we find many cases which hold that the term "person" includes corporations. Among them the comparatively recent case of Associated Cemetery Management, Inc. v. Barnes, C.A. Mo., 268 Fed.2d 97, 100, 102, which held in regard to the bankruptcy acts that the term "person" therein included corporations, unincorporated companies and associations.

To the effect that the due process clause of the Fourteenth Amendment to the Federal Constitution includes corporations as a "person," one of the latest cases on this is Freidus v. Freidus, Fla., 89 So.2d 604, 605. Further, as to the interpretation of a corporation as a "person" in the State of Missouri, it has been held in many cases, among them John Hancock Mutual Life Insurance Co. v. Hughes, Mo., 152 SW2d 132, 134, that an insurance company was a corporation and was therefore an artificial legal person. It has also been held that the statutory use of the word "persons" to include corporations is so general that to hold that they are not included requires clear and positive proof of a legislative intent to exclude them. Central Amusement Company v. District of Columbia, D.C. Mun. App., 121 A2d 865, 866. Which is, in this case, wholly lacking.

It is, therefore, upon the basis of the intent of the Legislature as derived from a full reading of the Act in question and upon

Honorable John D. Mitchell

- 3 -

September 4, 1963

the basis of the above-cited cases, our opinion that the term as used in House Bill No. 45, Seventy-second General Assembly, "any person" or "person," does include corporations as well as natural persons.

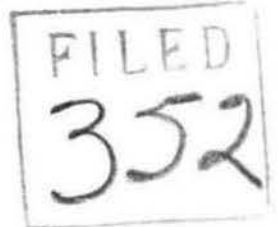
Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

RRN:sr

OPINION NO. 352  
ANSWERED BY LETTER



December 10, 1963

Honorable Don F. Whitcraft  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri

Dear Mr. Whitcraft:

This is in response to your request for an opinion of this office which request reads as follows:

"Cass County at its last general election adopted the Local Option County Registration Law (Chapter 114).

"The City of Belton (in Cass County) has by ordinance adopted Senate Bill No. 227 of the 72nd General Assembly, known as section 114.047.

"Prior to the City of Belton adopting section 114.047 the county of Cass had spent considerable time at considerable expense organizing its voter registration. In doing so it established precincts extending beyond the corporate limits of the City of Belton. Now it would appear that the county will have to re-organize these precincts so as to confine them within the city limits and establish precincts out in the county. At whose expense will this reorganizing of precincts be; the county or the city?

"I also note in paragraph 2 of section 114.047 that 'No election precinct established in the city, town or village under the provisions of this chapter shall embrace territory outside the corporate limits of the city, town or village'. Is this provision to be interpreted literally so that no precincts shall extend beyond the corporate limits of any city, town or village regardless of whether they have adopted section 114.047? You'll note the provision uses the word 'chapter' and not 'section'.

"We anticipate many problems on this section 114.047 in the near future and would appreciate your opinion on the points I have touched on."

We believe that the reorganization of precincts required under the new ordinance should be accomplished at the expense of the county. This conclusion is based upon the provisions of subsection 1 of Section 114.110, Cum. Supp. 1961, which reads:

"The county court shall provide for and pay the expenses incurred under the operation of this chapter."

We are of the further opinion that the first sentence of subsection 2 of Section 114.047, V.A.M.S., 1963, applies only to those cities, towns and villages which have adopted Chapter 114. Election precincts are established under the authority of Chapter 111, RSMo 1959, not Chapter 114. Hence, the phrase "under the provisions of this chapter" appearing in subsection 2 must be read so as to apply only to cities, towns and villages which have brought themselves under Chapter 114 by adopting it. Therefore, when election precincts are established by a county which has adopted Chapter 114 prior to the adoption of such chapter by a city, town or village, precincts may be established which are partly within and partly without the incorporated area. However, such procedure would invite a situation, such as that which has arisen here, wherein new precincts must be established upon the subsequent adoption by a city, town or village of Chapter 114.

Honorable Don F. Whitcraft

From the date of your letter, it appears that the ordinance in question was adopted by the City of Belton prior to October 13, 1963, the effective date of Senate Bill No. 227. In these premises, we would seriously question the validity of an ordinance passed in accordance with the provisions of a statute which had not come into effect at the time of the enactment of the ordinance.

For your information we are forwarding herewith a copy of an opinion request answered by letter of advice to the Honorable Ronald Belt on July 18, 1963, which holds that a city may not validly enact an ordinance pursuant to statutory authorization prior to the effective date of the authorizing statute.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

Enclosure



September 4, 1963



Honorable Charles G. Hyler  
Prosecuting Attorney  
St. Francois County Courthouse  
Farmington, Missouri

Dear Mr. Hyler:

We have received your opinion request of August 23, 1963, in which you have inquired about sheriff's bills for feeding and boarding of prisoners, and the authority of the county court to pay or not to pay these bills.

To answer your question I am enclosing two opinions as follows: No. 1 to the Hon. John Hosmer, Webster County, Marshfield, Missouri, dated December 20, 1954, and No. 2, an opinion to the Hon. D. R. Jennings, Prosecuting Attorney, Montgomery County, March 10, 1952. A full reading of these enclosed opinions will, I believe, answer your questions. I specifically direct your attention to page 11 of the opinion to D. R. Jennings, wherein it is stated in subparagraph 3 as follows:

"The County Court is required by the statute to audit the monthly statement of the Sheriff to determine if such board and food have been furnished at actual cost, and if so to then draw a warrant on the County Treasury payable to the Sheriff for such actual cost of performing such services." (Emphasis supplied.)

From a reading of the above quoted portion of said opinion conclusion, it would appear to me that if the county court should ascertain by the required audit that the statement of the sheriff reflected the fact that such board and food had not been furnished at actual cost, they could refuse to pay such statement.

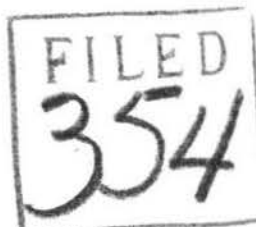
Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

RRN:sr  
Enc. (2)

October 10, 1963



Honorable Stewart E. Tatum  
Prosecuting Attorney  
Jasper County  
Joplin, Missouri

Dear Mr. Tatum:

In your letter of August 23, 1963, you inquire as to whether the Coroner or the Health Department may legally require an autopsy in order to advance or facilitate public health purposes.

Jasper County is a second class county and the general provisions of Chapter 58, RSMo 1959, relating to coroners is applicable to the coroner of your county. We have found nothing in this chapter which authorizes the coroner to call a coroner's jury and thereafter perform an autopsy for public health purposes or the advancement of science. Likewise, we have checked the public health statutes and we have located no statutory grant of authority to public health agencies which would permit them to order an autopsy.

For your convenience we are enclosing a copy of a recent opinion issued by this office in regard to the office of coroner in Jackson County. Jackson County is a first class county, but we believe that some of the general discussion in this opinion may be of interest to you.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

CB:df  
enc.

Sept 9, 1963

Opinion No. 365



Honorable Frank L. Mickelson  
State Representative  
Cass County  
Freeman, Missouri

Dear Mr. Mickelson:

This is in answer to your recent letter in which you inquire whether there has been any change in the opinions of this office concerning the practice of teaching by a member of the General Assembly. There has been a change.

On May 9, 1949, this office issued an opinion to Honorable Ealum Bruffett in which it was held that members of the Legislature may teach school while the Legislature is not in session. One of the grounds upon which that opinion was based was that a school district was not a municipality within the meaning of Section 12 of Article III of the 1945 Constitution of Missouri, which reads as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the



Honorable Frank L. Mickelson

emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

On October 18, 1962, the 1949 opinion to Honorable Ealum Bruffett was withdrawn. The basic reason for withdrawing the opinion was because the last sentence of Section 12 of Article III of the Constitution of Missouri provides that such section shall not apply to members of school boards. Apparently the constitutional convention took the view that a school district is a municipality because they made an exception for school board members. If Section 12 of Article III of the Constitution did not apply to school districts, the exception would have been unnecessary. However, the exception does not apply to teachers who are employed by the school district, and under this interpretation Section 12 of Article III of the Constitution would prohibit a teacher employed by a school district from holding the office of senator or representative. For these reasons it was determined that the opinion to Honorable Ealum Bruffett of May 9, 1949, was incorrect and the opinion was withdrawn.

This conclusion is further supported by an opinion of this office issued on February 5, 1963, to Honorable Loicen O. Boyd, Prosecuting Attorney, Worth County, Grant City, Missouri, which held that school districts may be termed municipalities or municipal corporations. A copy of this opinion is enclosed for your information.

In view of the foregoing, this letter is to inform you that there has been a change in the opinions of this office and that it is our present conclusion that a teacher who is employed by a school district in Missouri may not hold the office of senator or representative.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

WW:BJ

Enclosure

COMMITTEEMEN:  
WARDS:  
COUNTY COURT:  
CITIES, TOWNS AND VILLAGES:  
CITIES OF THIRD CLASS:  
PRECINCT:  
BOARD OF ELECTION COMMISSIONERS:  
ELECTIONS:

1) The provisions of Section 120.770 1959, ~~may~~ refer to any city divided into wards if the county court sees fit to divide the township into election districts coincident with the ward boundaries. A village is not a city under the Missouri statutes, therefore the above opinion does not apply to wards of a village.  
2) Precincts in third class cities with city manager form of government are deemed wards under 78.540 (6), RSMo 1959, hence the above opinion applies to such precincts.  
3) The Board of Election Commissioners of Kansas City, not the County Court of Clay County, is authorized to divide that part of Kansas City in Clay County into wards under Section 117.190, RSMo 1959, in conjunction with Section 117.050, RSMo 1959.

September 17, 1963

Honorable Wendell D. Rosenbaugh  
State Representative  
First District, Clay County  
7217 North Prospect  
Kansas City 19, Missouri

OPINION NO. 368

Dear Mr. Rosenbaugh:

You recently requested an opinion of this office on the following questions:

"1. Do the provisions of Section 120.770 referring to Wards in any city, refer to every city and village in Clay County which is divided in Wards?

"2. Are precincts in 3rd class cities with city manager form of government to be considered Wards under the meaning of Section 120.770?

"3. Under Section 117.190, who has the authority to divide that part of Kansas City in Clay County into Wards?"

In answer to your first question, I refer you to two pertinent opinions of this office. The first opinion is to Honorable Hugh P. Williamson, under date of May 20, 1948, and the second is to Honorable Robert G. Kirkland, under date of February 14, 1952.

The Williamson opinion considered a problem similar to yours, i.e., a city divided into wards located within a township. It held on page 3 that:

FILED  
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Honorable Wendell D. Rosenbaugh

"Thus, the fact that the city of Fulton has been divided into wards for municipal purposes is not binding upon the county court when dividing the township of Fulton into election districts. Nor are the six election districts as established by the county court in Fulton Township entitled to representation on the party committees, due to the provisions of Section 11579, R. S. Mo. 1939, which reads as follows:

"The word 'county' as used in this article shall include the several counties of this state and the city of St. Louis, and the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards, or to any subdivision less than a township in any county.'

"By the provisions of Section 11579, supra, [now Section 120.760, RSMo 1959] it is clear that no less a subdivision than a township in a county is entitled to committee representation unless, as indicated above, the county court has recognized city wards as election districts by establishing coincident boundary lines."

The Kirkland opinion refers to Clay County and holds consistently with the Williamson opinion that a ward of a city divided into wards is entitled to a committeeman and committeewoman if the ward boundary coincides with the election district boundary. The ward of Kansas City located in Clay County in regard to elections is not under the control of the Clay County Court, but under a board of election commissioners as provided in Sections 117.020 and 117.050(5) and (6). Under Section 117.190, RSMo 1959, the board is ordered to divide the city into wards, hence the authority controlling the elections, i.e., the board, has made the ward an election district.

Honorable Wendell D. Rosenbaugh

The remaining area in Clay County in regard to elections is controlled by the county court and Section 111.220, RSMo 1959, empowers the county court "to divide any township in their respective counties into two or more election districts." Hence, if the county court sees fit to divide the township into election districts along the ward lines of any city within a township, then a committeeman and committeewoman may be elected from each ward so consistent with election district lines as established by the county court.

If the election district lines do not coincide with the ward lines, then under Section 120.760, supra, and as the Williamson opinion held, representation should be limited to one committeeman and one committeewoman from each township.

In your first question you also asked if Section 120.770 referred to villages divided into wards. It is our opinion that it does not. Section 120.760, supra, states that Section 120.770 is not to "apply to any subdivision less than a ward within any city subdivided into wards." [Emphasis ours]

The Legislature has recognized the fact that towns and villages are not cities by providing a separate chapter for towns and villages, Chapter 80, RSMo 1959. This legislative recognition is further emphasized by Section 72.050, RSMo 1959, which provides the procedure whereby a village may become a city:

"All towns not now incorporated in this state containing less than five hundred inhabitants are hereby declared to be villages; provided, that any village in this state now or hereafter having more than two hundred inhabitants may by majority vote of the qualified electors therein elect to become a city of the fourth class."

Therefore as a village is not a city, the subdivision of such village into wards has no effect on the committeeman situation as the wards referred to in Section 120.770, supra, are limited to wards within a city subdivided into wards by Section 120.760.

In answer to your second question concerning precincts in third class cities with city manager form of government being considered wards under Section 120.770, supra, it is necessary to look at Chapter 78, RSMo 1959, the chapter relating to third class cities with city manager form of

Honorable Wendell D. Rosenbaugh

government. Section 78.540 (6), RSMo 1959, authorizes the council to divide the city into precincts:

"6. The council shall by ordinance, resolution or otherwise, divide the city into as many voting precincts as it may deem necessary to afford all the voters a convenient opportunity of exercising the right of franchise in all municipal elections to be held in the city and each of said precincts shall be deemed a ward within the purview of the general and primary election laws of the state." [Emphasis added.]

The underscored portion of the statute shows that such precincts are to be deemed wards under the general and primary election laws. Since election for committeeman is part of the election laws of the state, the precincts of a third class city with a city manager form of government are deemed to be wards for this purpose. Therefore, under our answer to your first question, if the county court has seen fit to divide the township into election districts coincident with these precinct lines, each precinct in such city is entitled to a committeeman and a committeewoman.

In your third question, you ask who has the authority to divide that part of Kansas City located in Clay County into wards. This question was partially answered in our answer to your first question and we repeat now, that under Section 117.190, RSMo 1959, it is provided:

"1. It shall be the duty of the board to divide, and to keep divided by re-districting, such cities [Kansas City] into not less than twenty nor more than twenty-five wards." [Emphasis ours.]

The board referred to here is the "board of election commissioners of such city" as defined in Section 117.010 (3), RSMo 1959, here, the Board of Kansas City. The powers of the board with reference to elections within its city is plenary as provided by Section 117.050, RSMo 1959:

"5. Upon the appointment of such commissioners, the county clerk of the county in which such city is situated, and the board of election commissioners or other custodians of said property shall, upon demand, turn over to such board of election commissioners all registry books, poll books, tally sheets and ballot boxes heretofore used,

Honorable Wendell D. Rosenbaugh

and all other books, forms, blanks, stationery and property of every description in any way relating to registration or election, or the holding of elections, within said city.

"6. Said board of election commissioners shall make all necessary rules and regulations, not inconsistent with this chapter, with reference to the registration of voters and the conduct of elections and shall have charge of and make provisions for all elections, general, special, local, municipal, state, county, all primaries, and of all other of every description, to be held in such city or any part thereof, at any time."

It is seen from this statute that the county court where the city is located is to turn over all its books relating to elections within such city and that the board has charge of all elections in such city. The County Court of Clay County has no authority over that part of Kansas City located in Clay County as far as elections are concerned; thus it has no power to divide that part of Kansas City within Clay County into wards.

#### CONCLUSION

It is the opinion of this office that:

1) The provisions of Section 120.770, RSMo 1959, refer to any city divided into wards if the county court sees fit to divide the township in which the city is located into election districts with boundaries coincident with the ward boundaries. A village is not a city under the Missouri statutes, hence the above opinion does not refer to villages so divided into wards even if such ward boundaries coincide with election district boundaries;

2) Precincts in third class cities with city manager form of government are deemed wards under Section 78.540 (6), RSMo 1959, hence the above opinion relating to wards in any city is applicable to precincts in a city of third class

Honorable Wendell D. Rosenbaugh

with city manager form of government;

3) Section 117.190, RSMo 1959, in conjunction with Section 117.050, RSMo 1959, authorizes the Board of Election Commissioners of Kansas City, not the County Court of Clay County, to divide that part of Kansas City situated in Clay County into wards.

The foregoing opinion which I hereby approve was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

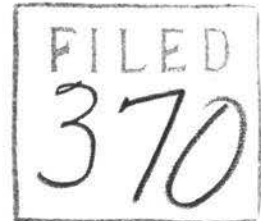
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cc: Honorable Gerald Kiser  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Honorable John Lodwick, Jr.  
Judge, Probate Court and Ex Officio Magistrate  
Clay County  
Liberty, Missouri



November 7, 1963



Honorable Frank Conley  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Dear Mr. Conley:

This is in response to your recent request for an opinion of this office relating to the validity of certain marriages contracted in the State of Arkansas. As you indicated in correspondence subsequent to your original letter, "The problem has arisen as a result of newspaper articles indicating that Arkansas has declared void certain marriages wherein the parties to same are under a certain age. It is my recollection from a reading of such articles that the statute in question was enacted by the Arkansas legislature in about 1943."

We requested the Attorney General of Arkansas to advise us of the specific nature of this problem and received from him a letter which reads in part as follows:

"The inquiries which you have received are resulting from the Social Security Administration's refusal to recognize as valid, or qualify for benefits, any marriage consummated subsequent to a 1941 Act in which either party was below the required minimum age. A copy of this Act, codified as Ark. Stats. § 55-102 (1947), is enclosed.

"Also enclosed is a copy of a memorandum opinion which represents our interpretation of the statute and the marriages regulated by it. This opinion does not in any way bind the Social Security Administration."

The memorandum opinion referred to in the above quotation was issued on July 19, 1963, to certain residents of Missouri. The pertinent portions of that opinion provide as follows:

"I am writing you in reply to your letter in which you inquire about the legality of marriages in Arkansas where the age of one or both of the parties is less than the legal minimum age as required by Ark. Stats. § 55-102 passed in 1941.

"Although it is our opinion that such under age marriages were legal under Arkansas law until declared invalid by a competent Court, the Regional Office of the Social Security Administration does not agree with our interpretation. Mr. Patrick A. Hebert, the Deputy Regional Attorney for the Department of Health, Education and Welfare has held that the Social Security Administration interprets these marriages as being void and hence, widows of such marriages are ineligible for social security benefits.

"We regret that the Social Security Administration has taken the position that they have on this question. However, our office has no control over their decision. We are sincerely hoping that a proposed curative bill in the next session of the Arkansas Legislature to remedy this situation will become law and make these under age marriages valid. If this is done, we hope Social Security will then accept these marriages as legal and widows of such marriages will be eligible for social security benefits in the normal course of law. You can rest assured that our Office will offer any assistance we can to the passage of this bill and the recognition of marriages such as yours.

"As concerns the children of such marriages, their status as legitimate has never been questioned, Ark. Stats, Ann. § 61-104 (1947) provides:

The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

For the sake of completeness, we will set out the pertinent provisions of the Arkansas statute in question, Section 55-102 (1947):

"Every male who shall have arrived at the full age of 18 years, and every female who shall have arrived at the full age of 16 years, shall be capable in law of contracting marriage; if under those ages, their marriages shall be absolutely void.

"Provided that males under the age of 21 years and females under the age of 18 years shall furnish the clerk, before the marriage license can be issued, satisfactory evidence of the consent of the parent or parents or guardian to such marriage, and, in all cases where the consent of the parent or parents or guardian is not provided or there shall have been a misrepresentation of age by a contracting party, such marriage contract may be set aside and annulled upon the application of the parent or parents or guardian to the Chancery Court having jurisdiction of the cause."

This office will not undertake to question an interpretation of an Arkansas statute by the Attorney General of that state. Consequently, we are of the opinion that such marriages are valid unless dissolved by a court of competent jurisdiction.

We might note parenthetically that the recorder of deeds of Boone County could, under the circumstances which you describe, properly issue a marriage license to the parties who contracted such marriages in Arkansas as have been ruled invalid by the regional office of the Social Security Administration. If that office were correct in its interpretation of Arkansas law, the parties to such marriages would presumably be eligible for a license in this state. If the parties are validly married to each other at this time, we do not believe that such marriage presents any statutory disqualification for the issuance of a marriage license when the applicants are married to each other at the time they apply for the license.

Honorable Frank Conley

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Section 451.030, RSMo 1959, declares all marriages void "where either of the parties has a former wife or husband living, . . . unless the former marriage shall have been dissolved." However, this statute was obviously directed at pre-existing relationships with third parties (that is, "former" rather than present marriages) and not at relationships such as we have here. None of the other statutory prohibitions against the issuance of marriage licenses contemplates situations of this type, Sections 451.020, 451.050, 451.090, RSMo 1959, and we can perceive no valid reason for refusing to issue a license under the circumstances described in your letter.

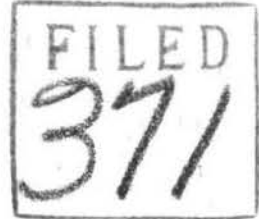
Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

AJS:lt

October 11, 1963



Honorable Edwin W. Mills  
Prosecuting Attorney  
St. Clair County  
P. O. Box 151  
Osceola, Missouri

Dear Sir:

In answer to your opinion request of September 9, 1963, I am enclosing a copy of Opinion No. 374 of 1963, addressed to the Honorable John Conley, Jr., which I believe will help in your understanding of this problem. You have also specifically asked three questions in your letter as follows:

1. "Is there any exception in case an old deed is presented for recording?"
2. "Can the recorder properly write in the required name and address of a grantee?"
3. "If not, should he withhold it from record?"

In answer to your first question it is the opinion of this office that the statute as enacted provides for no exception in the case of an old deed and, therefore, the prohibition contained in said Section 59.330, subsection 1, Laws 1963, effective date October 13, 1963, applies.

In answer to your second question, we know of no authority for the recorder of deeds to add any notation to or subtract any notation from any instrument presented to him for recording. The recorder of deeds is given



Honorable Edwin W. Mills

certain specific authority to record certain instruments which meet the required statutory provisions, and it is our opinion that he may not properly write in the address of a grantee on the deeds presented to him for recording.

In answer to your third question, I believe that it is completely answered in the words of the attached Opinion No. 374 (1963) that the recorder of deeds shall not record any such instrument unless said required mailing address appears clearly thereon.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

Enclosure

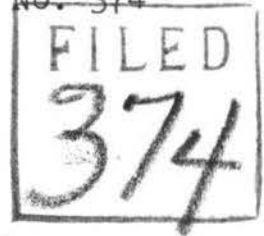
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RECORDERS: 1. Mailing address of grantee or one of the grantees must  
COUNTIES: be placed upon all deeds except deeds of trust or of ease-  
RECORDS: ment or of right-of-way conveying any lands or tenements.  
DEEDS:  
2. Recorder of deeds shall not record any such instrument  
unless said required mailing address appears clearly  
thereon.  
3. Provisions of Sec. 442.390 & 442.400, RSMo 1959, are  
not affected by omission of said required names upon  
said deeds.

October 11, 1963

Opinion No. 374

Honorable John Conley, Jr.  
Member, Missouri House of Representatives  
5852 Wabada Avenue  
St. Louis 12, Missouri



Dear Mr. Conley:

This opinion is in answer to your inquiry of September 9, 1963, which is stated as follows:

"The above referred to Missouri Senate Bill 187, has caused much comment and confusion as to the wording of the Bill as passed.

"What seems to be the most confusing is the latter part of the Bill which reads: provided however, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address. e.g. what if the address is not contained on the deed or instrument.

"Would you please clarify so that I may understand more clearly what the effect of the Bill will really be."

In answering this request, we are rendering our opinion as to the meaning of what will be, on October 13, 1963, Section 59.330(1), Laws 1963, and which reads in full as follows:

"59.330. It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be

Honorable John Conley, Jr.

proved or acknowledged according to law, and authorized to be recorded in their offices; all deeds, except deeds of trust, easement or right-of-way conveying any lands or tenements must contain a mailing address of one of the grantees named in the instrument, and the recorder of deeds shall not record such instrument absent such addresses; provided however, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address;"

As may be seen from the foregoing, and a reading of the section prior to October 13, 1963, there has only been added the provision that the grantee's mailing address must be contained on certain specified instruments and that they shall not be filed by the recorder of deeds absent said address, with the added provision that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address.

It is the opinion of this office, after a full perusal of Senate Bill No. 187, 72nd General Assembly 1963, that the mailing address of the grantee or one of the grantees must be placed upon all deeds except deeds of trust or easement or right-of-way conveying any lands or tenements, and that the recorder of deeds shall not record such instrument unless said required mailing address appears clearly thereon. This would, in our opinion, be a strict prohibition to the recorder of deeds not to file any of said instruments unless these provisions are fully complied with, and, since it does form a prohibition, this would be ample authority for recorders of deeds to refuse to file for record any instrument not meeting these requirements.

As to the provision contained in said Senate Bill 187, 72nd General Assembly 1963, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address, it is assumed that the statutory constructive notice therein referred to is that contained in Section 442.390, RSMo 1959, which provides in effect that any instrument in writing that is recorded in the prescribed manner shall impart notice to all persons of the contents, and further, that all subsequent purchasers and mortgagees shall be deemed to purchase with notice of said instrument. The statute under discussion herein,

Honorable John Conley, Jr.

Section 59.330(1), and this above stated provision, only provide that if the recorder should file said instrument without the required mailing address being thereon, that this shall make no difference as to the legal effect of Section 442.390, and also the above provision contained in Section 59.330 would, in our opinion, not affect the validity of the instrument as provided in Section 442.400, RSMo 1959, which provides that no instrument in writing shall be valid except between the parties and others that have actual notice of said instrument until the same is deposited with the recorder of deeds. In effect, then, all that this last provision of Section 59.330 does is state that if the recorder should ignore the provisions of the section requiring the name of the grantee to be placed thereon, and goes ahead and files for record, that the statutory constructive notice or the validity of the instrument, as provided in Sections 442.390 and 442.400, shall not be affected.

#### CONCLUSION

Therefore, it is the opinion of this office that:

1. The mailing address of the grantee or one of the grantees must be placed upon all deeds except deeds of trust or of easement or of right-of-way conveying any lands or tenements.

2. That the recorder of deeds shall not record any such instrument unless said required mailing address appears clearly thereon.

3. The provisions of Section 442.390, RSMo 1959, and 442.400, RSMo 1959, are not affected by the omission of said required names upon said deeds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

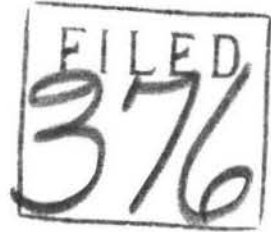
Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

RN:BJ

September 19, 1963



Honorable Orville C. Winchell  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri

Dear Mr. Winchell:

This is in answer to your letter of September 12, 1963, in which you request an opinion of this office, and which reads in part as follows:

"I am certain that there will be monies forwarded Laclede County on the gasoline tax and the question now arises as to whether or not the County Court can issue warrants which will be honored by the County Treasurer on a Class 3 budget appropriation."

We further understand the facts to show that Laclede County received more gas tax money, under Article IV, Section 30(a) of the Missouri Constitution as amended, than was anticipated in the county budget. Laclede County now has this money and the question concerns the legality of expenditures of this money.

Sections 50.680 and 50.710, RSMo 1959, define expenditures in Class 3 as those for the upkeep, repair or construction of roads and bridges on other than state highways and not in any special road district. The gasoline tax provided under Article IV, Section 30(a), of the Constitution as amended is known as the county aid road trust fund, and paragraph 1(1) thereof provides that:

"\* \* \* The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and



Honorable Orville C. Winchell

repairs of roads, bridges and highways,  
and subject to such other provisions  
and restrictions as provided by law.  
\* \* \*

From the language of the Constitution and statutes it is clear that the gasoline tax money referred to in your opinion request must be placed in Class 3 of the county budget and paid out as a Class 3 expenditure.

The only question is whether the unanticipated money which Laclede County now has may be expended even though it was not specifically included in the budget of Laclede County.

We call your attention to the case of State v. Gribb, 273 S.W. 2d 246, which followed the rule that a strict compliance with the county budget law was required but held, l.c. 250, that the object of the county budget law is to compel counties to operate on a cash basis and that the sum available to be spent in any one year is the revenue provided for that year plus any unencumbered balances from previous years. We believe this opinion shows a trend toward a more liberal construction of the county budget law.

On July 26, 1961, this office issued an opinion to Honorable James R. Reinhard, Prosecuting Attorney, Monroe County, Paris, Missouri, a copy of which opinion is attached. That opinion was based on the case of Gill v. Buchanan County, 346 Mo. 599, 142 S.W. 2d 665, which case was cited and approved in State v. Wade, Mo., 231 S.W. 2d 179, where the court said, l.c. 183:

"\* \* \* while the Legislature did not fix the exact amount to be included in the budget, its direction in these statutes \* \* \* is a mandate to the county court to include a reasonable amount for that purpose in each year's budget; \* \* \*"

In State v. County Court of Barry County, 363 S.W. 2d 691, the court said, l.c. 695:

"\* \* \* The order of the circuit judge made pursuant to Section 483.345 constituted a direction or mandate to the county court to include \$2,400 in

Honorable Orville C. Winchell

the budget for the purpose stated in the order, and the county court had no more authority to ignore this valid directive by budgeting a lesser amount than it would have to budget an amount for salaries of county judges at an amount greater than that fixed by the Legislature. The provisions of Section 50.740 cited and relied on by appellants, and quoted above, do not prohibit the issuance of the warrants in this case. The warrants would not be issued contrary to any provision of the budget law when that law is read with and construed in its relation to Section 483.345."

In accordance with the foregoing, it is our opinion that the previous opinion of this office issued to Honorable James R. Reinhard on July 26, 1961, is controlling in this instance and that the county aid road trust fund money received by LaCade County under Article IV, Section 30(a) of the Constitution, as amended, which the county court did not and could not anticipate receiving at the time the budget was prepared, must be considered to be in Class 3 as a matter of law, and such money should be expended as any other funds in Class 3.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

Enclosure

WW:BJ

INSURANCE: Articles of Incorporation of Tower National Life Insurance Company.

September 16, 1963

OPINION NO. 377

Honorable Ralph H. Duggins  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Duggins:

Receipt is acknowledged of your letter of September 12, 1963, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Tower National Life Insurance Company, which Declaration of Intention also included a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

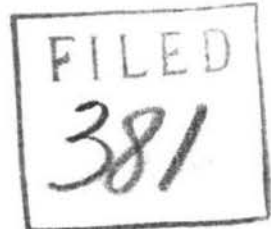
Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JLO'M: jh

September 30, 1963



Honorable Milton Litvak  
Vice Chairman  
Missouri Commission on  
Human Rights  
Room 234, Capitol Building  
Jefferson City, Missouri

Dear Sir:

We have your letter of September 16, 1963, in which you request an opinion of this office as follows:

"I am enclosing a copy of Public Accommodations Ordinance (Ordinance No. 3499) recently passed by the Council of the City of St. Joseph, Missouri and a copy of the St. Joseph city charter.

"I would like your opinion whether the city has the power to enact such an ordinance dealing with public accommodations."

We have examined Ordinance No. 3499 and the Charter of the City of St. Joseph in the light of the decision of the Missouri Supreme Court in *Marshall v. Kansas City, Mo.*, 355 SW2d 877.

In the *Marshall* case, the Supreme Court ruled that an ordinance of Kansas City designed to prohibit discrimination because of race or color in places of public accommodation was within the powers conferred upon the city council by the city charter. We note that Ordinance No. 3499 is nearly

identical in its pertinent provisions to those sections of the Kansas City ordinance set out in the Supreme Court's decision.

Moreover, it appears that the St. Joseph city charter contains provisions substantially similar to those provisions of the Kansas City charter quoted by the Court in its opinion and upon which the Court's decision was grounded. In particular, we refer to Subsections (12), (19), (20), (22) and (29) of Section 2.13, and Section 19.1, all of the Charter of the City of St. Joseph.

In upholding the Kansas City public accommodations ordinance, the Supreme Court said (1.c. 355 SW2d 883):

"We are constrained to hold that this municipal ordinance, designed to prevent discrimination by reason of race or color in restaurants, bears a substantial and reasonable relation to the specific grant of power to regulate restaurants and to the health, comfort, safety, convenience and welfare of the inhabitants of the city and is fairly referable to the police power of the municipal corporation." [Citing cases.]

In view of the near identity between the relevant provisions of the Kansas City ordinance and charter and the St. Joseph ordinance and charter, it is apparent that the Supreme Court's decision on the Kansas City public accommodations ordinance is controlling and that the City of St. Joseph does have the authority to enact Ordinance No. 3499.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JJM:ml



BONDS:  
SHERIFF:  
FEES:  
COUNTIES:

The sheriff of a third class county may not legally accept and retain a fee for the taking of a bail bond in a criminal case.

October 10, 1963

Opinion No. 385

Honorable Robert E. Yocom  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri



Dear Mr. Yocom:

We are in receipt of your opinion request of September 20, 1963, in which you have requested an official opinion of this office. The pertinent part of your letter reads as follows:

"Is the sheriff of a third class county (McDonald County) allowed to accept and retain any fee for taking a bond in a criminal case?"

We have searched the statutes at some length, attempting to find some authority for the sheriff of a third class county accepting and retaining a fee for taking a bond, which we assume to be a bail bond, in a criminal case. We have failed to find any specific authority either in the statutes or the Supreme Court rules with which we could answer this question in the affirmative.

Section 558.140, RSMo 1959, provides a specific penalty for the exaction of fees to which an officer is not entitled. Said section reads as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

Honorable Robert E. Yocom

As authority that the sheriff may not levy such charge, we cite the case of Smith v. Pettis County, 136 S.W. 2d 282, 1.c. 285, where the Court stated, in discussing the right of public officials to compensation:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S.W.2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S.W.2d 182  
\* \* \*"

#### CONCLUSION

It is the opinion of this office, based upon the above discussion, that the sheriff of a third class county may not legally accept and retain a fee for the taking of a bail bond in a criminal case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

RN:BJ

AGRICULTURE:  
FEEDS:

Salt distributed to feed dealers which is either mixed in commercial feeds or sold directly to farmers for feeding to animals is not a commercial feed under the Missouri Commercial Feed Law of 1959.

December 4, 1963

Opinion No. 386

Mr. William L. Wyss, Director  
Feed and Seed Division  
Missouri Department of Agriculture  
P.O. Box 630  
Jefferson City, Missouri



Dear Mr. Wyss:

We render herewith our opinion in answer to your request of September 20, 1963, which was as follows:

"We would like to have an opinion as to whether or not salt which is distributed by salt companies to feed dealers and which is either mixed in commercial feeds or is sold direct to farmers for feeding to animals would be considered a commercial feed under the Missouri Commercial Feed Law. For your information, we refer you to Section 266.161, Subsection 4, which defines commercial feeds."

Common salt, the substance with which we are concerned, is a white crystalline compound of sodium and chlorine. It is taken from the earth in the form in which it is eventually used, although a certain amount of refining is necessary. Salt is used and consumed primarily in its natural state. Although salt is sold commercially for feed under different brand names, an analysis would show each product to be the same except for a small amount of neutral additives to make the salt "flow". If any ingredients are added to the salt other than such neutral additives, it is no longer salt and is not within the purview of this opinion.

The Missouri Commercial Feed Law of 1959 is set out in Sections 266.151 to 266.171, RSMo 1959. An analysis of this law indicates it was intended to cover substances which may vary in chemical content rather than a single chemical compound such as salt whose composition is fixed and unchangeable.

The term "commercial feeds" is defined in subsection 4 of Section 266.161 as follows:

- "All materials which are distributed for use as feed for animals other than man except:
- (a) Unmixed whole seed and meals made directly from the entire seeds;
  - (b) Unground hay; and
  - (c) Whole or ground straw, stover, silage, cobs, and hulls when not mixed with other materials."

Although salt was not specifically listed, the materials excepted, like salt, are all unmixed ingredients whose composition does not change.

Subsection 5 of Section 266.161 defines a feed ingredient as: "Each of the constituent materials making up a commercial feed". Contrasting this definition with the definition of a commercial feed contained in the preceding subsection, salt would more closely be identified as a feed ingredient rather than a commercial feed.

Other sections of the act indicate it was intended to cover combinations of several ingredients rather than a single ingredient which does not vary in composition. Section 266.181 requires that any commercial feed shall be accompanied by a registration label bearing certain information including:

"\* \* \*(3) The guaranteed analysis of the commercial feed, listing the minimum percentage of crude protein, minimum percentage of crude fat, and maximum percentage of crude fiber. For mineral feeds the list shall include the following if added: Minimum and maximum percentage of calcium (Ca), minimum percentage of phosphorus (P), minimum percentage of iodine (I), and minimum and maximum percentages of salt (NaCl).\* \* \*"

The fact that salt is only one of the ingredients of a mineral feed and, within the limits set forth on the label, may be added to or taken from a feed without requiring re-registration, Section 266.171-3, or re-labeling, supports our reasoning that salt is a feed ingredient and is not itself a commercial feed.

Section 266.211 provides that no person shall distribute an adulterated feed. It also defines the conditions under which a feed shall be deemed adulterated. In each circumstance, the adulteration occurred because a substance had been added to the feed or taken from it. Nothing could be added to or taken from salt without changing the entire character of the substance.

The Commercial Feed Law was enacted to provide government supervision over feed mixtures and to protect stock owners from feeding their animals adulterated or unwholesome feeds. The reason for the law and the provisions thereof do not appear applicable to the sale of salt which is not a variable mixture of several elements but is a compound sold in its natural state whose composition does not vary to any appreciable degree. The fact that a very small percentage of neutral additives may be put in the salt does not change the basic nature of the substance.

It is therefore our opinion that the sale of salt to feed dealers is not covered by the Commercial Feed Law of Missouri. If salt is sold by feed dealers as an ingredient in commercial feeds, it is the responsibility of these dealers to comply with the law.

In this opinion, we do not pass on the question of whether salt that has been treated or other single substances in their natural state are commercial feeds as defined in the Commercial Feed Law.

#### CONCLUSION

It is the opinion of this office that salt distributed to feed dealers which is either mixed with commercial feeds or sold directly to farmers for feeding to animals is not a commercial feed as used in the Missouri Feed Law of 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant John H. Denman.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General



September 30, 1963

Opinion No. 390  
Answered by Letter

Honorable Maurice Schechter  
Senator, Thirteenth District  
Senate Post Office  
Capitol Building  
Jefferson City, Missouri



Dear Senator:

This will acknowledge your letter of inquiry dated September 23, 1963, concerning the effect of Senate Bill 309 upon our narcotic drug laws.

You will recall the letter of February 21, 1963, from my Assistant, Mr. Albert J. Stephan, Jr., in response to your request for advice upon how to accomplish the desired change, subject of your present inquiry.

I, as well as other members of my staff, have reviewed this matter and concur in Mr. Stephan's opinion.

In other words, the sale of preparations containing codeine in quantities of more than two grains in any forty-eight hour period to any one person could only be effected through a change in Section 195.080, RSMo 1959. Senate Bill 309, as passed, does not do this.

Subsection 3 of Section 195.080, RSMo 1959, states that the section shall not be construed to limit the sale, etc., of narcotics sold in compliance with the general provisions of the narcotics law. The general provisions of the law contain no language which would increase the exception contained in Section 195.080.2(1). Senate Bill 309 refers only to the keeping of records and cannot be construed to

Honorable Maurice Schechter

-2-

change the subject limitations.

Since Section 195.080 was neither repealed nor amended,  
as suggested by Mr. Stephan, it still controls.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

HLM:kld

October 10, 1963

OPINION REQUEST NO. 392  
ANSWERED BY LETTER



Honorable Jack K. Smith  
Executive Secretary  
Water Pollution Board  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated September 26, 1963, submitting for our appraisal Water Pollution Board regulations to supplement the marine toilet law, being House Bill No. 263, enacted by the 72nd General Assembly.

We have read these regulations and House Bill No. 263, and it is our opinion that these regulations are valid and enforceable. However, it should be borne in mind that Section 6 of this act provides that it shall become effective one year after its passage and approval and, of course, the regulations could not become effective until the same date.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

CB:bj

September 30, 1963

Opinion No. 393  
Answered by Letter



Mr. J. T. Johnson  
Executive Secretary  
Missouri Boat Commission  
Jefferson City, Missouri

Dear Mr. Johnson:

This is in answer to your letter dated September 26, 1963. In your letter you quote a portion of the recently enacted Senate Bill No. 172. This Bill repeals and re-enacts Section 306.160, RSMo 1959. The quoted portion of this statute is as follows:

"The commission is hereby authorized to appoint a secretary, who shall have charge of the office of the commission and shall be the custodian of the records of the commission, and such other employees, not to exceed 15, as shall be necessary to properly perform the duties of the commission and shall fix the compensation of the secretary and other employees within the amount appropriated by the general assembly."

It is the opinion of this office that this language authorizes the commission to appoint a secretary plus 15 other employees if they are necessary to properly perform the duties of the commission.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

November 7, 1963



The Honorable William H. Bruce, Jr.  
Prosecuting Attorney  
Reynolds County Courthouse  
Centerville, Missouri

Dear Mr. Bruce:

This is in answer to your inquiry of September 30, 1963, which may be stated as follows:

May a person elected as prosecuting attorney of a fourth class county, and performing the duties and drawing the salary provided by said county, be appointed prosecuting attorney of an adjoining fourth class county under the provisions of Section 105.050, RSMo, perform the duties of prosecuting attorney and receive the salary of prosecuting attorney from the county to which he was appointed?

In answer to the above question, it may be answered in the affirmative, and I am enclosing herewith opinion of May 2, 1952, of this office, to the Hon. Ray Adams, Representative of Reynolds County, House of Representatives, Jefferson City, Missouri, which opinion specifically answers the question of the propriety of one prosecuting attorney being appointed prosecuting attorney in an adjoining county.

To answer the second part of this question, that is, may you draw the salaries provided for by both counties, Sections 56.280 and 56.285, RSMo, set forth the compensation to be paid prosecuting attorneys in class three and four counties, and in this regard, Section 56.280, RSMo, provides in part that prosecuting attorneys in counties having less than 7,500 population shall receive two thousand one hundred sixty-two dollars and fifty cents (\$2,162.50), [Reynolds County]; and in counties containing 7,500 population and less than 11,000 population, shall receive two thousand three hundred eighteen dollars and seventy-five cents (\$2,318.75), [Wayne County]. In addition to the above compensation, Section 56.285, RSMo, provides for an additional six hundred dollars to be paid to



The Honorable William H. Bruce, Jr.

the prosecuting attorney for duties in relation to aid to dependent children. These two Sections, 56.280 and 56.285, RSMo, then, provide for a total salary of \$2,918.75 in Wayne County, with a population of 8,638, and a total salary of \$2,762.50 in Reynolds County, with a population of 5,161.

We find nothing either in our statutes or our Constitution which would limit the payment or prohibit the payment by each county of the salary of the prosecuting attorney to the person holding such office either by election or by appointment. In fact, it is specifically provided by Sections 56.280 and 56.285, RSMo, the amount of salary the prosecuting attorney shall receive. In this specific case, you are the prosecuting attorney of Reynolds County by the election of the people, and the prosecuting attorney of Wayne County by appointment of Governor Dalton, pursuant to the provisions of Section 105.050, RSMo. You have received this commission from the Governor for each office, and are performing the duties of each office and are, in our opinion, entitled to the salary provided by the statutes for each office.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

RRN:10

Enc.

November 25, 1963



Honorable James T. Riley  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Mr. Riley:

This letter is in response to your recent request for an opinion of this office which reads as follows:

"I am attaching a Petition to Abate Tax Assessment which has been filed in this county on behalf of the trustees of the Missouri Bar.

"I will appreciate it if you will furnish me your opinion on whether or not the Missouri Bar property is exempt from taxation under the provisions of Section 137.100, V.A.M.S."

The Missouri Constitution of 1945, Article X, Section 6, exempts from taxation:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Honorable James T. Riley

The statute to which you refer, Section 137.100, RSMo 1959, states in part:

"The following subjects are exempt from taxation for state, county or local purposes:

(1) Lands and other property belonging to this state;"

This office has conferred with representatives of the Missouri Bar, to ascertain further facts. The bar believes that the property is exempt under the Constitution and subsection (1) of Section 137.100, supra, as "Lands and property belonging to the state," because it is a state agency, an arm of the Supreme Court, and as such, its land property is exempt as state property.

If the bar is a state agency then the property belonging to it is exempt. The Missouri Supreme Court in *School District of Berkeley v. Evans*, 363 Mo. 208, 250 SW2d 499, declared that the test for exemption of state property is ownership and not use. At 250 SW2d 499, 500, the Court stated:

" \* \* \* The test to be applied to property held by the state and its political subdivisions is ownership while the test as to other exemptions which may be granted by general law is whether the property is being used for the purposes enumerated \* \* \* " [Emphasis ours]

There is no question as to ownership in this case. The Missouri Bar owns the property against which the assessment has been made. The bar acquired the property under authority of Supreme Court Rule 7.10 (as amended November 20, 1961) in January, 1962. The question then is:

"Is the Missouri Bar a state agency?"

There are no decisions by the Missouri courts nor is there any legislative fiat declaring the Missouri Bar to be a state agency. In order to determine if the Missouri Bar is a state agency it is necessary to examine the nature and function of the Missouri Bar and to examine the decisions of courts of other states.

Honorable James T. Riley

The Missouri Bar was established by Supreme Court Rule 7. It is an integrated bar, i.e., a compulsory association composed of all the lawyers of the state, membership in which is a prerequisite to the practice of law in the state. Thus the Missouri Bar is composed of all the officers of the court.

In the preamble to Supreme Court Rule 7, the purpose of the integrated bar is stated as follows:

"Rule 4 states that it is the 'responsibility of the members of the Bar of this Court and of all lawyers who practice in the State of Missouri' to 'strive at all times to uphold the honor and maintain the dignity of the profession and to improve not only the law but the administration of justice.' In recognition of that public obligation owed by the legal profession, the Court hereby promulgates this rule for the purpose of aiding the lawyers of Missouri in the perfection of a means of organization that will best aid them in the discharge of their recognized public duty."

Rule 7.10, Rules of the Supreme Court, expressly authorized the bar to acquire land and construct and maintain a headquarters building and granted numerous powers with respect thereto and required annual reports and accounting to the Supreme Court. It is clear from Rule 7 as a whole that the Missouri Bar is an arm or agency of the Supreme Court and subject to its authority and control, and its general purpose is to aid the Court and its officers to best carry out their public responsibilities.

In other states where the bar has been integrated, the courts have declared the bar to be a state agency. In *State Bar of Michigan v. City of Lansing*, 361 Mich. 185, 105 NW2d 131, the Supreme Court of Michigan held that the property of the State Bar of Michigan was exempt from taxation as "Public property belonging to the State of Michigan." The Court had the question of whether the bar was a state agency or invalid as a corporation created by a special act of the legislature. The Court resolved the question in favor of the bar being a state agency.

In *Board of Commissioners Mississippi State Bar v. Collins*,

Honorable James T. Riley

59 So. 2d 351, the Mississippi Supreme Court, which had the same question as the Michigan Supreme Court as to whether the bar was a state agency or a corporation created by special act of the legislature, held, at page 355:

"In view of its membership, its functions and the purposes of its creation, the State Bar, created by the act, possesses none of the attributes of a private corporation. And the State Bar act is in no sense a local or private act. It is general in its application and applies to all lawyers in the state who are actively engaged in the practice of law. The State Bar is in reality an agency of the State created . . . for the purpose of regulating more effectively the practice of law and for the purpose of encouraging the study of improved methods of procedure and practice in the courts." [Emphasis added]

It is to be noted that the Bars of Michigan and Mississippi were created by an act of the legislature and not by Supreme Court Rule as was the Missouri Bar, but this office cannot see how this factor would distinguish the Missouri Bar from the Michigan and Mississippi Bars with respect to its being a state agency.

Indeed the legislature may establish an integrated bar as well as provide legislation to aid the judicial arm of the state, but this legislative power is not exclusive. The judiciary has the inherent power to regulate and define the membership in the bar of the state and thereby to create a State Bar. See *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 95 P. 2d 113.

Since an integrated bar can be established either by action of the legislature or by the Supreme Court, it is in either instance a state agency.

This conclusion is supported by an annotation at 114 A.L.R. 161, entitled "State bar created by act of legislature or rules of court; integrated bar," which states:



Honorable James T. Riley

"While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

Therefore, this office is of the opinion that the State Bar is a state agency and the land they have acquired and the building which they are constructing and the equipment to be placed therein under authority of Supreme Court Rule 7.10 (as amended November 20, 1961) is exempt under Section 137.100(1), *supra*.

#### CONCLUSION

It is the opinion of this office that the Missouri Bar is a state agency and that lands and property belonging to the Missouri Bar are exempt from taxation for state, county or local purposes, under Section 137.100, RSMo 1959.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JDF:df

SPECIAL ROAD DISTRICTS: Special road districts may not issue tax  
TAX ANTICIPATION NOTES: anticipation notes, but may issue warrants  
WARRANTS: up to the amount of revenue anticipated for  
the year in which the warrants are issued.

OPINION No. 397

October 21, 1963



Honorable William E. Seay  
Prosecuting Attorney  
Dent County  
Salem, Missouri

Dear Mr. Seay:

This is in answer to your recent request for an opinion,  
which reads as follows:

"I have been requested by the Secretary  
and Treasurer of the Special Road Dis-  
trict in our county to request an opinion  
from your office as to whether or not a  
Special Road District duly organized under  
the laws of this state can borrow money  
through Tax Anticipation Notes in the same  
manner that a county of the fourth class  
can do."

A county of the fourth class is authorized by Sections  
50.070 to 50.140, RSMo 1959, to issue Tax Anticipation Notes.  
I find no statutory authority authorizing a Special Road Dis-  
trict to issue such notes; hence, the Special Road District  
may not so act.

If the Special Road District to which you refer was  
organized under Sections 233.010 to 233.165, RSMo 1959, then  
the Special Road District may issue warrants in anticipation  
of the districts annual income under Section 233.135, RSMo  
1959, as was held in an opinion of this office under date of  
April 11, 1961, addressed to Stephen H. Zeilmann.

Honorable William E. Seay

As to benefit assessment special road districts, organized under Sections 233.170 to 233.315, RSMo 1959, although there is no specific statute authorizing the issuance of warrants in anticipation of the district's annual income as exists for the "3-mile" special road districts organized under Section 233.010 to 233.165, supra, this office has held in an opinion under date of October 10, 1946, addressed to Honorable Clark H. Gore, that even without such a statute a benefit assessment special road district may issue warrants up to the amount of revenue anticipated for the year in which the warrants are issued. The opinion based its ruling on *Hawkins v. Cox*, (Mo) 66 SW2d 539, which held that under Article X, Section 12, of the 1875 Constitution [now Article VI, Section 26 of the 1945 Constitution]:

" . . . any such municipal corporation [special road district] may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year . . . ' "

#### CONCLUSION

It is the opinion of this office that Special Road Districts may not issue Tax Anticipation Notes, but a Special Road District organized under Sections 233.010 to 233.165, RSMo 1959, or organized under Sections 233.170 to 233.315, RSMo 1959, may issue warrants up to the amount of revenue anticipated for the year in which the warrants are issued.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JDF:df  
Encs. (2)

October 4, 1963



Honorable James A. Noland, Jr.  
State Representative  
Camden County  
Osage Beach, Missouri

Dear Mr. Noland:

This refers to your letter of September 30, 1963, requesting an opinion concerning a question relating to the description of land in a collector's deed executed pursuant to a sale on account of delinquent taxes.

It is our understanding that you are concerned with a case in which land was described on the tax rolls merely as a part of a larger tract, without any identification as to which part, and that description was used in the advertising and sale of the land and in the collector's deed executed pursuant to such sale. Your question is whether the collector who issued the deed, with such insufficient description, may execute a correction deed, with a proper description of the land which was intended to be assessed and sold, after his term of office has expired.

We are enclosing copies of opinions furnished to George H. Seifert on July 6, 1942, and to M. M. Brees on October 12, 1942, which are to the effect that a collector has no authority to sell land under a description different from that which appears on the tax rolls or to correct a fatally defective description by the execution of a deed properly describing the lands intended to be assessed and sold. These opinions answer your question in the negative, even as to collectors still in office. Upon a re-examination of the matter, we now find no reason to differ from the conclusions reached in these prior opinions.

Yours very truly,

JCB:df  
ENCs.

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THOMAS F. EAGLETON  
Attorney General

COUNTY COLLECTOR:

Collector of St. Louis County does not have the power to invest County funds in his possession.

ST. LOUIS COUNTY:

December 5, 1963



Opinion No. 400

Honorable Peter J. J. Rabbitt  
State Representative  
9th District, St. Louis County  
7 North Seventh Street  
St. Louis 1, Missouri

Dear Mr. Rabbitt:

This opinion is rendered in response to your request of October 3, 1963, for an official opinion of this office. You inquire:

"Can the collector of St. Louis County legally invest any of the funds under his control in United States Government Securities, the income from which would accrue to the benefit of St. Louis County alone."

We understand your inquiry as limited to the investment of county funds and not including the investment of state, municipal or other funds in the hands of the collector. Clearly only county funds are to be invested if the income is to "accrue to the benefit of St. Louis County alone".

County officers have limited powers. They possess only such powers as have been expressly granted to them by statute or which are necessarily implied from the powers expressly granted to them.

"The policy of the State of Missouri . . . is clearly opposed to the view that any officer, such as a collector can bind the county save and except by such performance



Honorable Peter J. J. Rabbitt

of incumbent duties as prescribed by statute." State of Missouri ex rel. Brewer v. Federal Lead Co., 265 Fed. 305.

See also: Lamar Tp. v. City of Lamar, Mo., 169 SW 12, 15; King v. Maries Co., Mo., 249 SW 418.

Also, since St. Louis County is a charter county, the officers of St. Louis County are "obliged to look to the charter for (their) powers, and acts beyond the powers granted or necessarily implied therefrom are void". Schmoll v. Housing Authority of St. Louis County, Mo., 321 SW2d 494, 498.

Section 44.10 of the St. Louis County Charter prescribes the duties of the collector and provides:

"The Collector shall be responsible for the collection of all real and personal property, merchant and manufacturer, railroad, utility or other taxes for state, school, county or other purposes, and he shall perform such other duties as are provided by law or ordinance."

Nowhere in the state statutes, St. Louis County Charter or Ordinances of St. Louis County do we find any express grant of power to the Collector of St. Louis County to invest funds in his possession.

Moreover, the Ordinances of St. Louis County clearly manifest an intent that the collector is not to invest county funds in his possession. Section 303.010, St. Louis County Ordinances, 1961-62, provides:

"Any officer, employee, or agent of St. Louis County who shall receive any moneys belonging to the County, or any moneys not belonging to the County, which may be obtained by him by virtue of, or under color of such office or employment, which are to be held, paid out, or transmitted by the county or any officer, or agent thereof, shall promptly deposit all such moneys in the County Treasury; \* \* \*" (Emphasis added)

Honorable Peter J. J. Rabbitt

The word "promptly" has been defined as "immediately, given without delay or hesitation". Mercantile-Commerce Bank and Trust Co. v. Kieselhorst Co., Mo., 164 SW2d 342, 349; Black's Law Dictionary, 4th Ed., page 1379. For the county collector to invest county funds coming into his hands would be repugnant to his duty to deposit same without delay in the county treasury.

That county funds are not to be invested by the collector is further manifest by the St. Louis County Ordinance which makes the county treasurer responsible for the custody and investment of the county's funds. Section 303.030, St. Louis County Ordinances, 1961-62, provides:

"The County Treasurer shall be responsible for the custody of the County's funds and for the investment of any surplus funds which may accumulate from time to time in the County Treasury as provided by law for the investment of such funds. The Treasurer shall at all times keep the maximum amount of county surplus funds invested in securities so as to obtain the greatest return possible commensurate with the requirements of the law and sound investment practices."

We also note that Sections 303.090 to 303.110 of the Ordinances provide for the establishment of a County Fund Investment Advisory Committee to advise the county treasurer and council.

In summary, no statute or ordinance expressly authorizes the collector of St. Louis County to invest funds in his possession. Moreover, the design manifest by the Ordinances of St. Louis County is that county funds coming into the hands of the collector must be deposited without delay into the county treasury and that the treasurer shall be custodian and invest surplus county funds. Investment of county funds by the collector would be repugnant to this ordained scheme of handling county funds.

#### CONCLUSION

From the foregoing considerations, it is the opinion of this office that the Collector of St. Louis County does not have

Honorable Peter J. J. Rabbitt

the power to invest County funds in his possession.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

LCD:lt

October 4, 1963

Honorable Herman G. Kidd  
State Representative, Randolph County  
RFD #1  
Jacksonville, Missouri



Dear Representative Kidd:

You have requested an opinion of this office in connection with the following procedure which has apparently been long used by the County Collector of Randolph County.

Once each given year around Armistice Day for the period of approximately one week the County Collector temporarily establishes an office at Moberly, Missouri, which is the largest City in Randolph County containing more than one-half of the population of said County. The Collector moves his books and records from his office in Huntsville to this temporary office in Moberly. There are various moving expenses, janitorial expenses, etc., in connection with this occurrence. You inquire as to whether it would be legally permissible for the County Court of Randolph County to pay for these expenses.

Sec. 52.110 RSMo 1959 reads as follows:

"Collector's office, location - exception  
The collector shall keep his office at the county seat, except when meeting the taxpayers; provided, that in all counties in this state in which there is no bank located at the county seat and in which, according to law, two or more terms of the circuit court are held each year in some other town or city than the county seat and in which town or city are located one or more banks, the county collector may, at his option, keep his office in such town or city."  
(Emphasis supplied.)

October 4, 1963

Sec. 139.010 RSMo 1959 reads as follows:

**"Notice to taxpayers**

It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days, not less than three, that he will remain at each of such places for the purposes aforesaid; and it shall be his duty to attend at the time and place thus appointed, either in person or by deputy, to receive and collect such taxes; provided, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given."

These two sections when read in conjunction with each other make it appear that the legislature contemplated that on occasion the County Collector would find it necessary, convenient and expedient to move about in his county so as to better serve the needs of the residents.

Thus, it appears that the procedure set up by the Collector of Revenue in temporarily establishing his office in the largest city of the county so as to be more readily available to the taxpayers of that area would be a proper and legal one and in compliance with the aforementioned two sections.



Honorable Herman G. Kidd - 3.

October 4, 1963

Hence, payment by the County Court of the incidental expenses in connection with the establishment of such temporary office would be legal and proper.

Very truly yours,

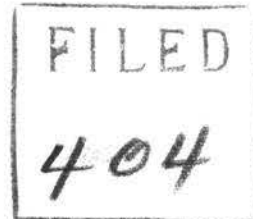
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THOMAS F. EAGLETON  
Attorney General

TFE:oh

Opinion No. 404 Answered By Letter

October 14, 1963



Honorable Thomas G. Woolsey  
Senator, 33rd District  
Versailles, Missouri

Dear Senator Woolsey:

We have your letter of October 8, 1963 regarding the requirements for candidates for county judge of a third class county.

Chapter 49, relating to county courts, does not specifically spell out any special requirements as do other chapters relating to other public officials.

Be that as it may, Attorney General McKittrick in 1944 ruled that what are now Sections 49.010 and 49.020 by necessary implication required that a county judge be a resident of the district in which he seeks election.

This 1944 opinion has been followed consistently and frequently reissued since that time, and since the statutes considered by Attorney General McKittrick have not been changed by the legislature, I presume the McKittrick opinion is as sound today as it was in 1944.

I am enclosing a copy of the aforementioned opinion.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

Enclosure

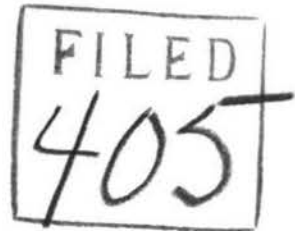
*No. 26, 1944*

TFE:BJ

October 14, 1963

OPINION REQUEST NO. 405  
ANSWERED BY LETTER

Honorable Edgar J. Keating  
State Senator  
Home Savings Building  
1006 Grand Avenue  
Kansas City, Missouri



Dear Senator Keating:

On October 8, 1963, you wrote a letter to this office requesting our opinion on the question of whether the forgiveness of a debt by will is taxable under the Missouri Inheritance Tax Law as a bequest from the testator to the legatee.

Enclosed you will find an opinion previously written by this office on June 20, 1933, which I believe sufficiently answers your question. This opinion holds that the forgiveness of a debt is to be treated as a legacy and taxed as such.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

EGB:bjj

Enclosure

INSURANCE: Articles of Incorporation of Modern American  
Life Insurance Company.

OPINION NO. 407

65102

October 11, 1963



Honorable Ralph H. Duggins  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Duggins:

Receipt is acknowledged of your letter of October 10, 1963, with which you submitted to this office an executed copy of Articles of Incorporation of original incorporators of the proposed Modern American Life Insurance Company to be formed under the provisions of Chapter 376 RSMo 1959. Also forwarded with your request for an opinion touching such Articles of Incorporation was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination of the Articles of Incorporation referred to in the preceding paragraph has been made, as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

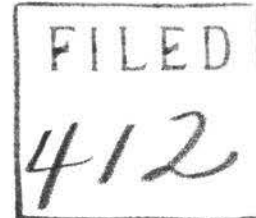
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THOMAS F. EAGLETON  
Attorney General

OPINION NO. 412 ANSWERED BY LETTER.

65102

October 16, 1963

Honorable Bill Crigler  
State Representative  
Howard County  
402 West Morrison  
Fayette, Missouri



Dear Mr. Crigler:

This is in response to your letter of October 12, 1963, enclosing an opinion of Mr. Thomas S. Denny, attorney, with respect to the validity of an ordinance of the City of Fayette concerning charges to users for the improvement and maintenance of city sewers.

A search of our files shows an opinion issued by the office of the Attorney General on February 23, 1939, to R. J. Newport, dealing with this subject. A copy of that opinion is enclosed.

Some further research on our part has turned up the cases of Maryville v. Cushman, 249 SW2d 347, and Hill v. St. Louis, 60 SW 116, and also 64 C.J.S., Section 1805(d), page 271.

I hope this information will be of assistance to you.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JGS:ml

Enc.

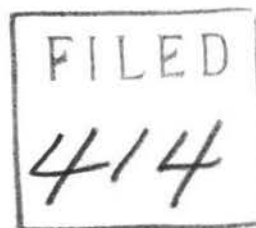


APPROPRIATIONS:  
HOUSE AND SENATE COMMITTEES:  
JOINT COMMITTEES:

Expenses incurred by the Joint  
Committee on Correctional Institutions  
and Problems should be paid from the  
appropriation made under Section 8.020  
in House Committee Substitute for  
House Bill No. 8 and cannot be paid from Section 8.010 of said bill.

December 13, 1963

OPINION NO. 414



Honorable Peter J. J. Rabbitt  
State Representative  
6th District, St. Louis County  
7720 Suffolk  
St. Louis 19, Missouri

Dear Mr. Rabbitt:

Reference is made to your request for an official opinion  
of this department which reads as follows:

"As chairman of the Joint Committee on  
Correctional Institutions and Problems,  
I am faced with a dilemma which calls  
for a legal opinion which I am asking  
at this time.

"The statutory authority as contained in  
Chapter 21 of the Revised Statutes of  
Missouri 1959, §21.445, paragraph 4 states  
that members 'shall be entitled to reim-  
bursement for actual and necessary expenses  
incurred in the performance of their of-  
ficial duties'. Paragraph 21.450 states  
that the Committee may, 'within the limits  
of its appropriation, employ such personnel  
as it deems necessary'. It is my opinion  
that the ordinary expenses of the Com-  
mittee should come from the House Contingent  
Fund appropriation, and not from the ap-  
propriation of the Committee.

Honorable Peter J. J. Rabbitt

"I would appreciate it if your office would make a study of this, and give me an opinion as the appropriation of the Committee itself is so small that it will not even cover the statutory duties imposed on the Committee as to expenses."

The act providing for the Joint Committee on Correctional Institutions and Problems, hereinafter referred to as the Joint Committee, was first enacted in 1957, Laws 1957, page 615. It is now found in Section 21.440 to and including Section 21.465, RSMo 1959. Section 21.455, defining the duties of the Committee, was amended by the 72nd General Assembly. Annotated Missouri Statutes, June 1963.

Section 21.445, RSMo 1959, provides in part for the organization of the committee after it has been appointed, provides for regular meetings at least once every six months, and provides for expenses of its members as follows:

"4. The members of the committee shall serve without compensation but shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties."

Section 21.450, RSMo 1959, provides as follows:

"The committee may, within the limits of its appropriation, employ such personnel as it deems necessary; and the committee on legislative research, within the limits of any appropriation made for such purpose, shall supply to the joint committee on correctional institutions and problems such professional, technical, legal, stenographic and clerical help as may be necessary for it to perform its duties."

Honorable Peter J. J. Rabbitt

House Committee Substitute for House Bill No. 8 enacted by the 72nd General Assembly provides in part:

"Section 8.010. To the General Assembly

Salaries of Members . . . . .	\$1,891,200
Mileage of Members. . . . .	84,000
Senate Contingent Expenses. . . . .	300,000
House Contingent Expenses . . . . .	450,000
Joint Contingent Expenses . . . . .	100,000

From General Revenue. . . . . \$2,825,200

"Section 8.020. To the Interim Committees of the General Assembly  
For the following:

Committee on Correctional Institutions and Problems. . . . .	\$3,000
Commission on Atomic Energy . . . . .	5,000
Coordinating Commission for the Handicapped . . . . .	4,000
Commission on Local Government. . . . .	5,000

From General Revenue. . . . . \$17,000"

The question at issue is whether the members of the Joint Committee are entitled to be reimbursed for their actual and necessary expenses as provided under Section 21.445, supra, from the appropriation for contingent expenses in Section 8.010, supra, or from the appropriation for the Committee under Section 8.020, supra.

Article IV, Section 23, Constitution of Missouri, 1945, provides that "Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Article IV, Section 28, Constitution of Missouri, 1945, provides in part that no money shall be withdrawn from the State Treasury unless the comptroller certifies it for payment and the State Auditor certifies that the expenditure is within the purpose of the appropriation.

Honorable Peter J. J. Rabbitt

In *State vs. Weatherby*, 350 Mo. 741, 168 SW2d 1048, the Supreme Court held that appropriation acts of the Legislature must be strictly construed. Therefore, the appropriation act now under consideration must be strictly construed and nothing can be inferred.

In *State ex rel. Jones v. Atterbury*, 300 SW2d 806, the Supreme Court considered the authority of the General Assembly to create an interim committee. The resolution passed by the General Assembly creating the committee provided for the members of the committee to be reimbursed for actual and necessary expenses. It further provided that these expenses should be paid from the contingent funds of the Senate and the House. There was no other appropriation made for the committee such as has been made for the committee now under consideration. The manner of the appropriation was not at issue before the court and therefore the decision as such has no bearing in resolving the question now being considered other than we believe it indicates the practice of the Legislature when provision is made for reimbursement of the expenses of the committee from the contingent funds.

We also call your attention to Section 21.183, RSMo 1959, where provision is made for newly elected members of the General Assembly to visit all state institutions before assuming their duties and that they are to be reimbursed for their expenses. This statute likewise provides that the reimbursement shall be made from the contingent fund of the House or Senate.

In Section 21.187, RSMo 1959, provision is made for the new members of the General Assembly to be reimbursed for their expenses in attending any legislative conference, and it also expressly provides that they should be reimbursed from the contingent fund of the House and Senate.

We believe that if the Legislature had intended for the members of the Joint Committee created under Section 21.440, *supra*, to have their expenses paid from the contingent fund, it would have so stated as was done in connection with other legislative committees.

Section 8.020, *supra*, expressly states that the appropriation is made for the "Committee on Correctional Institutions and Problems."

Honorable Peter J. J. Rabbitt

The language used in Section 8.020, supra, is not ambiguous and undoubtedly it was intended that it be used to reimburse the members for their expenses as well as other expenses incurred by the committee.

We do not believe the provision of Section 21.450, supra, which provides that the committee may, within the limits of its appropriation, employ such personnel as it deems necessary indicates that such appropriation is limited to the personnel so employed and that it is not to be used for paying the expenses of the members. The same appropriation act, Section 8.020, supra, also makes an appropriation to the Commission on Local Government. The Missouri Commission on Local Government is provided for in Chapter 17, Missouri Revised Statutes Cumulative Supplement, 1961. Provision is made for the members of that Commission to be reimbursed for their necessary expenses. There is no provision, however, for them to employ additional personnel or create any other expenses other than the expenses of the Committee. This appropriation for the Commission on Local Government would be useless if the Committee is to be reimbursed for their expenses from the appropriation for contingent expenses of the General Assembly. Undoubtedly it was to be used to pay the members of the committee and the same is true regarding the appropriation for the joint committee.

#### CONCLUSION

It is our conclusion that the actual and necessary expenses of the Joint Committee on Correctional Institutions and Problems are to be paid under the appropriation made in Section 8.020 of House Committee Substitute for House Bill No. 8 passed by the 72nd General Assembly and that they cannot be paid from Section 8.010 of said bill.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, A. Moody Mansur.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General



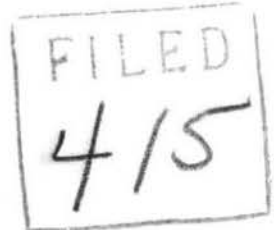
SCHOOLS  
SCHOOL DISTRICTS  
COUNTY  
BOARD OF EDUCATION

No person can be a candidate for election to a county board of education created by Senate Bill No. 327 of the 72nd General Assembly unless the person is a resident householder of the county in which the county board of education is created.

December 24, 1963

Opinion No. 415

Honorable Richard M. Webster  
State Senator, 32nd District  
204 South Garrison  
Carthage, Missouri



Dear Senator Webster:

This opinion is rendered in response to your request of October 15, 1963, for an official opinion of this office. You inquire:

" \* \* \* whether (under the new County School Board Law, Senate Bill 327) a resident of an adjoining county, who is also a resident of a Jasper County School District, can be a candidate for election to the County Board of Education."

(Senate Bill 327 of the 72nd General Assembly repealed Section 165.657, RSMo 1959, and enacted a new section in its place.)

Jasper County is a second class county. Subsection (4) of Senate Bill No. 327 provides for the creation of county boards of education in second, third and fourth class counties and also sets out the qualifications of members of the board. Subsection (4) provides:

"There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the State of Missouri; a resident householder of the county, and shall be not less than twenty-four years of age. \* \* \*" (Emphasis Added).

Honorable Richard M. Webster -2-

This provision unequivocally requires that each candidate for election to the county board of education be a "resident householder of the county" in which the county board of education is created.

CONCLUSION

It is the opinion of this office that no person can be a candidate for election to a county board of education created by Senate Bill No. 327 of the 72nd General Assembly unless the person is a resident householder of the county in which the county board of education is created.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

October 17, 1963



Honorable Paul Knudsen  
Prosecuting Attorney  
Caldwell County  
Kingston, Missouri

Dear Mr. Knudsen:

This is in reply to your letter of October 15, 1963.  
In that letter you raised three questions as follows:

"1. Section 198.220 provides for the notice of hearing on petition and costs of notices, but does not provide for the costs of election. Is the County subject to the costs of the first election where said territory or district does not include the entire County, and when a small part of the territory or district is located in an adjacent county?

"2. Section 198.210 provides that the petition shall be filed in the office of the county clerk in which the greater part of the area is situated, and the judges of the county court of the county, shall set the petition for public hearing. What is the county court's position at this public hearing, and do they set as a judicial body to determine the need for the establishment of the nursing home district or is it mandatory that they call an election providing the petition is in due form, and contains the necessary signatures, as set out by law?

"3. In our situation when the districts are comprised of townships, is the vote

Honorable Paul Knudsen

in the township that which determines their inclusion in the district, or is it the district vote as a whole?"

In regard to your first question you correctly indicate that Section 198.220 provides that the costs of printing and publication or posting of notices of public hearing thereon shall be paid in advance by the petitioners, and, if a district is organized under Sections 198.200 to 198.350, they shall be reimbursed out of the funds received by the district from taxation or other sources. You further inquire as to whether the county is subject to the costs of the first election where said county or district does not include the entire county and when a small part of the territory or the district is located in an adjacent county. In order to reach a proper conclusion concerning this question it is necessary for us to read together Sections 198.200 to 198.340, Laws of 1963, inclusively, which sections deal with the organization, powers and duties of nursing home districts created pursuant thereto.

Section 198.210 clearly indicates that the proposed district must contain a contiguous area but that the area involved may be situated in two or more counties. It further provides that the petition for creation of a district shall be filed in the office of the county clerk of the county in which the greater part of the area is situated and the judges of that county court shall set the petition for public hearing.

It will be noted that this law expressly provides for the advancement of costs by the petitioners in connection with printing and publication or posting of notices of public hearing and expressly provides for reimbursement of the petitioners by the new nursing home district, if such a district is created, but there is no indication that the costs of the election itself should be borne by the petitioners or could be legally paid by the new nursing home district if it is voted into existence. It is also significant that the order calling for an election, setting the date of the election, providing for notice of election and the canvass of results of the election are all duties imposed upon the county court of the county wherein the original petition was properly filed. Section 198.280 also delegates to the "declaring county court" the responsibility to divide the district into six election districts as equal

Honorable Paul Knudsen

in population as possible. These duties concerning the election and the creation of election districts appear to be a responsibility of the "declaring county court" even though a proposed nursing home district may involve land in one or more additional counties.

Thus, we believe that since these responsibilities concerning the election are placed on the declaring county court and there is no express authority for the payment of such expenses by the new nursing home district, then these election costs should be borne by the "declaring county court." The payment of election costs by the county court for special district elections not involving the entire county or even such payment where a small portion of the special district is in an adjacent county, is not unprecedented. In this connection we are enclosing a copy of an official opinion of this office dated June 27, 1955, which involves special road districts. We believe that this opinion supports the conclusions reached herein.

In your second question you inquire as to the position or role of the "declaring county court" at the public hearing. In particular you inquire as to whether the county court should sit as a judicial body to determine the need for the establishing of a nursing home district or whether it is mandatory that they call an election if the petition meets the requirements of law. We have found no provision in this law wherein the Legislature has granted any discretion to the county court in determining the need for a nursing home district. Paragraph 2 of Section 198.220 provides that notice of the hearing "shall" be given by the county court. Section 198.230 provides that if two or more petitions covering in part the same territory are filed, then all of these petitions "shall" be consolidated for public hearing. This section further provides that at the public hearing the petitioners in the first petition may move to amend the petition to include any part of the territory described in the subsequent petitions and any such motion "shall" be allowed by the judges of the county court. Section 198.230 further provides that the public hearing "shall" proceed upon the first petition and further proceedings upon other petitions "shall" be held in abeyance until certain events occur. None of these events or contingencies seem to involve any exercises of discretion of the county court.

Section 198.240 provides that if the petition, territory, and proceedings meet the requirements of Sections 198.200



Honorable Paul Knudsen

to 198.350, the judges of the county court "shall" enter an order finding and determining the sufficiency of the petition. We believe that our conclusion that the action of the county court in regard to formation of a new nursing home district is mandatory rather than discretionary is supported by an opinion issued by this office on July 11, 1960, which held that where a petition signed by 250 taxpayers of a county requesting the appointment of a public health nurse is presented to the county court it is mandatory upon the county to make such an appointment. We are enclosing a copy of that opinion for your convenience.

In your third question you indicate that the proposed nursing home district which you inquire about is comprised of several townships and you want to know whether it is the vote in the township which determines their inclusion in the district or is it the district vote as a whole. We believe it quite obvious that nursing home districts formed pursuant to Section 198.200 to 198.340 are not required to attach any significance to township or county boundary lines and such coincidence is not significant in counting the votes to ascertain whether the proposition carried. In fact, Section 198.270 expressly provides "if the order shows that the proposition to organize the district received a majority of the votes cast, the order shall declare the district organized." We hope that the above discussion will assist you in resolving the questions involved in this situation.

Yours very truly,

---

Thomas F. Eagleton  
Attorney General

CB:df  
Encs.

Opinion #417 Answered by letter

October 18, 1963



Honorable James T. Riley  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Mr. Riley:

We have your letter requesting our opinion as to whether mobile homes or house trailers should be considered as "motor vehicles" and hence prohibited from being sold on Sunday by reason of Sec. 563.721.

For two reasons we do not consider mobile homes or house trailers to be "motor vehicles."

First, Chapter 301 deals with licensing of motor vehicles. Section 301.010 (15) defines "motor vehicles" as follows:

"any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."  
Section 301.010 (27) defines "trailer" as follows:

"any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

Honorable James T. Riley -

2. October 18, 1963

Second, when Senate Bill #49 was originally introduced it precluded the sale on Sunday, amongst other things, of "motor vehicles; mobile homes or trailers..." During the legislative process, the phrase "mobile homes or trailers" was deleted and the phrase "motor vehicles" remained. Hence, we conclude that it was the intent of the legislature not to include mobile homes or trailers in the prohibited categories.

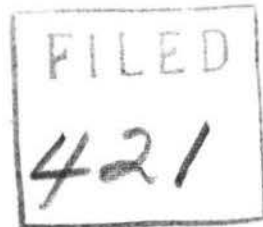
Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

bc: Koslow  
Gepford  
Hyer

October 31, 1963



Honorable Edward W. Speiser  
Prosecuting Attorney  
Chariton County  
Salisbury, Missouri

Dear Mr. Speiser:

You have requested the opinion of this office with respect to liability on the part of either the State or Chariton County for payment of certain items included in the fee bill for costs in the case of State v. Closciel Hayes. The defendant was prosecuted for murder in the first degree, and upon change of venue from Chariton County to Howard County was tried to a jury and found not guilty.

Section 550.040, RSMo, provides, with respect to cases such as that of Closciel Hayes, that "the costs" shall be paid by the State. Hence, if the items concerning which you inquire are such that under statutory authority they may be taxed as costs, and the amount thereof is within the statutory authorization, the State would be liable therefor.

Item 72 of the cost bill represents "fees" paid jurors. In an opinion of this office dated January 4, 1963, to Hon. Norman H. Anderson, copy of which is enclosed, this office ruled that in cases such as that of Hayes such fees are not a proper item of costs which may be taxed in the case in which the jurors are summoned or serve. Hence, the State would not be liable for Item 72.

Items 64, 65 and 66 of the fee bill represent board and lodging of the jury during the trial. We are informed by the Comptroller's office that the State actually paid \$246.76 of the total of \$333.56 set forth on the bill, rather than \$86.86. Evidently, the figures which were

submitted in the statement to the county court were transposed at some time. Therefore, the only amount in question on these items is \$86.86.

Section 550.020 (2), RSMo, specifically provides that in felony cases in which the jury is not permitted to separate, unless otherwise ordered by the court, it shall be the duty of the sheriff in charge of the jury to supply them with board and lodging "for which a reasonable compensation may be allowed, not to exceed three dollars and fifty cents per day for each member of the jury and the officer in charge." We are informed by the Comptroller's office that the State allowed the sum of \$52.50 for each of the days of May 23, 1960, May 24, 1960, May 25, 1960 and May 26, 1960. In arriving at this figure, the Comptroller assumed that there were thirteen jurors, one of whom was an alternate, and that one or more of the jurors was a woman, and therefore allowed the sum of \$3.50 per day for each of the thirteen jurors and for two officers (one in charge of the women jurors and one in charge of the male jurors). As for May 27, 1960, the entire amount claimed, \$36.70, was allowed. Hence, the amount paid, \$246.70, was computed upon the basis of the maximum allowable under the above statute by multiplying the sum of \$3.50 per day by fifteen, except with respect to May 27, 1960, for which the amount claimed was less than the maximum allowable under the statute. In our opinion, the Comptroller paid Howard County the maximum compensation which may be allowed the sheriff for board and lodging of the jury, and therefore the State is not liable for the balance of \$86.86.

Item 63 of the cost bill represents "sundries for jurors." We have no information as to the definition of sundries, as used in this item, or what was included therein, but in any event are aware of no statute which authorizes such an item to be taxed as costs. For such reason, the State is not liable therefor.

Items 68 and 69 of the cost bill represent fees to a guard, "patient support" and "mileage" in taking the defendant to Fulton State Hospital prior to trial for "observation," and thereafter returning the defendant to Howard County. The aggregate sum of \$17.20 is involved with respect to each trip. You have informed us that these expenses were incurred pursuant to an order issued by the circuit judge of Howard County upon application made by the defendant. We are aware of no statute



in force in 1960 which granted authority to the circuit court to make such an order or to tax the expenses incident thereto as part of the costs. For such reason, the State is not liable for these items. Your attention is directed to Senate Bill No. 143, enacted by the 72nd General Assembly, effective October 13, 1963, which would now appear to authorize the circuit court to order such an examination. However, this statute was not in effect at the time the order in question was made, and we express no opinion with respect to whether the expenses incident to such examination may now be taxed as costs.

Section 550.120, RSMo, provides in effect that in criminal cases in which the county is liable for costs and in which a change of venue is taken, the county in which the prosecution originated shall pay such costs. We enclose copy of opinion dated March 11, 1953, to Mr. Frank W. May, in which this office so ruled. However, Section 550.120 applies only to costs which are properly and legally taxable as such, and then only in those cases in which the county rather than the State is initially liable. The Hayes case does not involve liability of a county. All costs properly taxable therein are payable by the State.

In an opinion dated January 4, 1963, to Honorable John A. Honssinger, copy of which is enclosed, this office ruled that when jury fees are not properly taxable as costs, the county in which the case originated would not be liable therefor. Hence, Chariton County is not liable for Item 72.

In view of the specific statutory limitation upon the amount which may be allowed for board and lodging of juries, there is no basis upon which Chariton County can be charged with the additional amount claimed. In our opinion, it is equally clear that Chariton County is not liable for the other items above mentioned, inasmuch as there is an absence of statutory authority to tax them as costs.

Very truly yours,

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THOMAS F. EAGLETON  
Attorney General

JN:sr

Enclosures - 3

FOURTH CLASS CITIES:  
COMPENSATION:  
ZONING COMMISSION:  
CITY PLANNING COMMISSION:

A Fourth Class City may legally continue to pay compensation to members of an existing zoning commission which was in existence before the effective date of House Bill 317, 72nd General Assembly, after the effective date of such bill.

Opinion No. 433

December 4, 1963

Honorable Robert O. Snyder  
State Representative  
11th District, St. Louis County  
241 East Argonne Drive  
Kirkwood 22, Missouri



Dear Mr. Snyder:

Your recent request for an opinion of this office may be restated as follows:

May a Fourth Class City, which has by ordinance established a Zoning Commission and provided a per diem compensation for such commission, continue legally to pay such compensation after the effective date of House Bill 317, 72nd General Assembly?

The pertinent portions of House Bill 317, 72nd General Assembly are Sections 2, 3, 4, and 10, which have been designated by the Revisor of Statutes as Sections 89.310, 89.320, 89.330 and 89.390 [Laws 1963, V.A.M.S., August Pamphlet 1963]. These sections provide:

89.310. "Any municipality in this state may make, adopt, amend, and carry out a city plan and appoint a planning commission with the powers and duties herein set forth.

89.320. "The planning commission of any municipality shall consist of not more than fifteen nor less than seven members, including the mayor, a member of the council selected by the council, the city engineer or similar city official and not more than twelve nor less than four citizens

Honorable Robert O. Snyder

appointed by the mayor and approved by the council. All citizen members of the commission shall serve without compensation. The term of each of the citizen members shall be for four years, except that the terms of the citizen members first appointed shall be for varying periods so that succeeding terms will be staggered. Any vacancy in a membership shall be filled for the unexpired term by appointment as aforesaid. The council may remove any citizen member for cause stated in writing and after public hearing.

89.330. "1. The commission shall elect its chairman and secretary from among the citizen members. The term of chairman and secretary shall be for one year with eligibility for reelection. The commission shall hold regular meetings and special meetings as they provided by rule, and shall adopt rules for the transaction of business and keep a record of its proceedings. These records shall be public records. The commission shall appoint the employees and staff necessary for its work, and may contract with city planners and other professional persons for the services that it requires. The expenditures of the commission, exclusive of grants and gifts, shall be within the amounts appropriated for the purpose by council.

"2. Where a zoning or planning commission exists on the effective date of sections 89.300 to 89.480, it shall constitute the city planning commission for the purposes of sections 89.300 to 89.480 in lieu of the commission provided for herein with the same officers, membership procedures, powers and terms of office as theretofore existing, unless the council otherwise provides; except in a charter city where the provisions of the charter shall govern.

89.390. "The commission shall have and perform all of the functions of the zoning commission provided for in sections 89.010 to 89.250.

Honorable Robert O. Snyder

The situation presented in your letter involves the City of Fenton, a Fourth Class City, which had by ordinances established a Zoning Commission and provided compensation for its members. This Zoning Commission was in existence on the effective date of House Bill 317, 72nd General Assembly and is still in existence today.

The problem involved here is whether or not the City of Fenton can legally continue to pay this compensation to the members of the commission in light of Section 89.330(2), supra, which provides that a zoning commission in existence on the effective date of House Bill 317, supra, shall constitute the city planning commission in lieu of the commission provided in House Bill 317, supra, and Section 89.320, supra, which provides that the citizen members of the city planning commission shall serve without compensation.

Section 89.330(2), supra, does not provide that the existing zoning commission shall constitute the planning commission described in Sections 89.300 to 89.480. The existing zoning commission merely constitutes the city planning commission "for the purposes" of the act "in lieu of the commission" provided for therein. In other words, the existing zoning commission is a substitute for the city planning commission described in Sections 89.300 to 89.480, and is not such commission. It merely acts as such for the purposes of the statute.

Section 89.320, supra, provides in part:

"All citizen members of the commission shall serve without compensation."

This sentence refers to the city planning commission provided for by House Bill 317, supra. As the existing zoning commission is not such city planning commission, but merely a substitute for it for the purposes of the act, the sentence does not refer to such existing zoning commission and does not prohibit a city from compensating members of such existing zoning commission.

This office can find nothing else in Sections 89.300 to 89.480, or any other statutes which would prohibit the city from compensating members of the existing zoning commission after the effective date of House Bill 317, supra.

Honorable Robert O. Snyder

CONCLUSION

Therefore, it is the opinion of this office that a Fourth Class City may legally continue to pay compensation to members of an existing zoning commission which was in existence before the effective date of House Bill 317, 72nd General Assembly, after the effective date of such bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

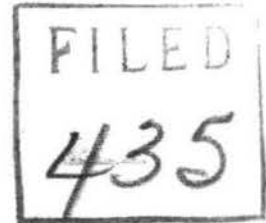
Very truly yours,

THOMAS F. EAGLETON  
Attorney General

JDF:df



November 1, 1963



Honorable Charles P. Moll  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Mr. Moll:

We have your letter which reads as follows.

"Our present Sheriff is now serving his third term of office. In 1961, through proper statutory proceedings, a certain woman was appointed as a Deputy Sheriff of this County. At that time there was no relationship between the Sheriff and this woman. Approximately three months ago, our Sheriff and this woman entered into a marriage contract. Since that time, the Sheriff's wife is still serving as a Deputy Sheriff but on a gratuitous basis. I am interested in having your opinion as to whether or not this situation is in violation of Article 7 Section 6 of the Constitution (Nepotism). I am of the personal opinion that since such a relationship did not exist at the time of the appointment, that this woman should be allowed to continue serving until the termination of the present term of office of our Sheriff, and be paid for her services.

"Your office has, most graciously, supplied me with a copy of an opinion rendered December 3, 1940. However, our Circuit Judge and other officials are interested in this situation and would like an opinion squarely and in point."

The December 3, 1940 opinion to Elmer A. Strom which we forwarded to you ruled that when a school teacher who was validly appointed later married a relative within the fourth degree of a school director who had voted for the employment of such teacher that such event did not constitute a violation of what is now Art VII, Sec. 6 of the Missouri Constitution insofar as it related to the term for which the teacher was appointed.

Honorable Charles P. Moll - 2.

November 1, 1963

The appointment of a deputy sheriff of a third class county is valid for the term of the Sheriff subject to the deputy's being discharged at the discretion of the Sheriff. See Sec. 57.250, RSMo 1959.

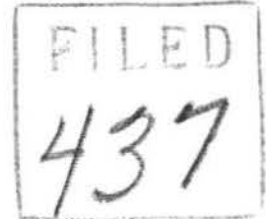
Based on the reasoning of the previously referred to 1940 opinion we concur in your opinion that since such a relationship did not exist at the time of the appointment, that this woman should be allowed to continue serving until the termination of the present term of office of our Sheriff, and be paid for her services."

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

OPINION NO. 437  
ANSWERED BY LETTER

November 7, 1963



Honorable Don F. Whitcraft  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri

Dear Mr. Whitcraft:

This is in answer to your request that this office make an explanation as to the holding of the Attorney General in the attached opinion rendered to Honorable Hugh P. Williamson under date of May 20, 1948, insofar as it relates to several specific questions.

The holding of such opinion is insofar as counties are concerned in which election districts are designated by the county court is as follows:

1. In a city which is divided into wards, a committeeman and committeewoman is to be elected from each ward which is itself a voting precinct or which contains only several entire voting precincts.

2. If the ward lines in a city divided into wards are crossed by precinct lines, that is, if a precinct or precincts in such ward extend beyond the ward lines into either other wards or outside the city limits, the wards are not authorized to elect committeemen and committeewomen.

3. A township is entitled to elect a committeeman and committeewoman but if wards within cities within such township are authorized as in paragraph 1 above to elect committeemen and committeewomen, the part of a township outside such wards authorized to elect committeemen and committeewomen is authorized to elect a committeeman and committeewoman.

Very truly yours,

C. B. Burns, Jr.  
Assistant Attorney General

CBB:jh

Opinion No. 438 Answered By Letter

November 14, 1963



Honorable Loyd J. Estep  
Representative Christian County  
Sparta, Missouri

Dear Mr. Estep:

We have your letter of October 31, 1963. Although your letter does not specifically so state, I take it that your inquiry relates to the appropriation and payment of funds for the office of Lieutenant Governor, since you specifically inquired about same at a recent legislative hearing.

As you probably know, for years and years the various expenses of the Lieutenant Governor's office were paid upon requisition made by him. Such procedure was authorized by the various appropriation bills as enacted by the legislature.

In 1959, the language of the appropriation bills was considerably shortened and the phrase "payable upon requisition made by the Lieutenant Governor" was deleted.

During the 1963 legislative session, question was raised as to this method of bill payment and Lieutenant Governor Bush himself decided that since the above language was no longer being used in the appropriation bills that the practice should be discontinued. Lieutenant Governor Bush on his own initiative made a full, public accounting of all expenditures made by him and the expenditures were submitted to the Comptroller who found them to be appropriate. I feel certain, if you desired it, that Lieutenant Governor Bush would be glad to furnish you with a copy of this list of expenditures.

Honorable Loyd J. Estep - 2.

November 14, 1963

Since that time, the Lieutenant Governor's appropriations have been handled in the identical manner as all other officials, departments, etc.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

cc: Representative Elva D. Mann  
Polk County



ASSESSMENT OF PROPERTY:  
ASSESSORS:  
COUNTY COURT:  
TAXATION:

The county court of any county is authorized to employ experts to replat and prepare maps, to locate and evaluate real estate in said county for purpose of aiding the county assessor in securing a full and accurate assessment of all taxable property in the county without submitting the question to the voters.

Opinion No. 451

November 13, 1963



Honorable Granville E. Collins  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri

Dear Mr. Collins:

Your recent request for an opinion of this office may be restated as follows:

"Under House Bill 48, 72nd General Assembly: May a county court of a county with less than forty thousand population employ experts to replat and prepare maps and to locate and evaluate real estate in said county for the purpose of aiding the county assessor in securing a full and accurate assessment of all taxable property in the county without submitting the question to the voters?"

House Bill 48, 72nd General Assembly repeals Section 137.230, RSMo 1959, and enacts in lieu thereof two new sections, 137.230 and 137.232. These two new sections read as follows:

137.230. "Nothing in section 137.225 shall be construed to apply to counties which have already adopted a method of plats and abstracts to facilitate the assessment and collection of the revenue; nor shall the provisions of section 137.225 apply to counties having less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election, upon the question being ordered to be submitted by the county court.

137.232. "In all counties the county court may, in addition to the foregoing provisions

Honorable Granville E. Collins

for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of the county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in the county or designated part thereof or otherwise and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury."

Section 137.230, H.B. 48, 72nd General Assembly, is a verbatim re-enactment of the first sentence of Section 137.230, RSMo 1959.

Section 137.232, H.B. 48 72nd General Assembly, re-enacts the second sentence of Section 137.230, RSMo 1959, except that it substitutes for the phrase "In counties having a population of over forty thousand. . .", the phrase "In all counties. . . ."

In an opinion of this office addressed to the Honorable Donald Duncan under date of October 4, 1961, this office concluded that under the second sentence of Section 137.230, RSMo 1959:

" . . . the County Court of St. Charles County, a county having a population over forty thousand, is authorized to employ experts to re-plat and prepare maps and to locate and evaluate real estate in St. Charles County for the purpose of furnishing information of value to the county assessor in securing a full and accurate assessment of all property in the county liable to taxation." [Emphasis ours]

The effect of the change in Section 137.230, RSMo 1959, by H.B. 48, 72nd General Assembly, on this opinion is to extend its conclusion to include all counties and not to limit it to counties having a population of over forty thousand.

Honorable Granville E. Collins

Therefore, it is the opinion of this office that under H.B. 48, 72nd General Assembly, the county court of any county may employ experts to replat and prepare maps to locate and evaluate real estate in said county for the purpose of aiding the county assessor in securing a full and accurate assessment of all taxable property in the county.

Furthermore, under the statute the county court of any county may adopt this method by an "order entered of record" and need not submit the question to the voters at a general election.

The only reference in H.B. 48, 72nd General Assembly to an election is in Section 137.230. There is no reference to an election in Section 137.232. Since it is under the authority of Section 137.232, H.B. 48, 72nd General Assembly, that the county court is authorized to employ experts, the legislature has clearly manifested its intent that no submission to the voters of the county at a general election is required to proceed under the authority of said section. The fact that the Revisor of Statutes has combined Sections 137.230 and 137.232, H.B. 48, 72nd General Assembly, into one section with two paragraphs, known as Section 137.230(1) and (2), has no effect on the intent manifested by the legislature.

#### CONCLUSION

It is the opinion of this office that under H.B. 48, 72nd General Assembly the county court of any county is authorized to employ experts to replat and prepare maps and to locate and evaluate real estate in said county for the purpose of aiding the county assessor in securing a full and accurate assessment of all taxable property in the county.

Furthermore, it is not necessary for the county court to submit this question to the voters of the county at a general election in order to so proceed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JDF:df  
Enc.

OPINION NO. 452  
ANSWERED BY LETTER

November 19, 1963



Honorable Ralph B. Nevins  
Prosecuting Attorney  
Hickory County  
Hermitage, Missouri

Dear Mr. Nevins:

This is in answer to your letter dated November 12, 1963, in which you request an official opinion from this office. In your letter you ask whether a special road district is entitled to any portion of the proceeds of the Missouri Motor Vehicle Fuel Tax.

The answer to your question lies in a discussion of Article IV, Section 30(a), Constitution of Missouri, 1945. As you well know, this constitutional amendment became effective on March 6, 1962. The amendment provides for the imposition of a tax upon fuel used for propelling motor vehicles on our highways. Once the tax has been collected, certain refunds are made and then the remaining net proceeds of the tax, after deducting costs of collection, apportionment and making refunds, is apportioned between the counties, cities, and the state in the following manner:

- (1) Five per cent goes to a special trust fund which is credited to the various counties of the state.
- (2) Fifteen per cent is allocated to the various incorporated towns, villages and cities having a population of more than two hundred according to the last federal decennial census.

Honorable Ralph B. Nevins

-2-

(3) The remaining eighty per cent of the net proceeds is allocated to the state.

There is no provision within the constitutional amendment for any fuel tax collected pursuant to it to be disbursed to road districts. Therefore, it is the opinion of this office that no state motor fuel tax is to be allocated to road districts.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

EGB:bjj



Opinion No. 454 answered by Letter.

November 18, 1963



Honorable E. J. Cantrell  
Representative, 6th Dist.  
St. Louis County  
3406 Airway  
Overland 14, Missouri

Dear Representative Cantrell:

You have asked for our opinion as to whether in a City of the Fourth Class the Mayor votes to break a tie on the Board of Aldermen when said body is selecting: (1) an "acting president" of the board or (2) the city clerk.

With respect to selecting an "acting president," we have an opinion of this office which rules that under Sec. 79.060, RSMo 1959, such position is to be created only when the mayor is absent. Hence, being absent, the mayor could not vote. (Opinion of November 10, 1936 to C. D. Bray enclosed.)

With respect to selecting the city clerk, we see no impediment to the mayor's voting to break a tie. See Mound City v. Shields, 278 S.W. 798, at page 801.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

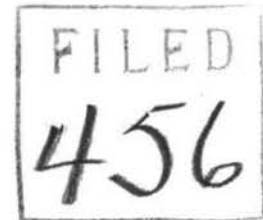
By \_\_\_\_\_  
Robert Northcutt  
Assistant Attorney General

enc.

STATE DIVISION OF COMMERCE  
AND INDUSTRIAL DEVELOPMENT:  
RESOURCES AND DEVELOPMENT:

Division of Commerce and Industrial  
Development has authority to provide  
planning assistance and to contract for  
and receive federal grants or financial  
assistance for counties, municipalities  
and metropolitan areas for planning pur-  
poses.

November 27, 1963



Opinion No. 456

Mr. Lawrence A. Schneider  
Director, Division of Commerce  
and Industrial Development  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Schneider:

This will acknowledge receipt of your opinion request of  
November 8, 1963, which reads as follows:

"In order to comply with the Federal  
requirements for an application for  
an Urban Planning Grant, your opinion  
is hereby requested as to the authority  
of this Division to perform such work  
as provided by Chapter 255.130 to  
255.140 and 255.150 of the Revised  
Statutes. We ask for your opinion as  
it presently applies under the existing  
law."

The above mentioned sections were enacted by the Legis-  
lature in 1959, Laws of Missouri, 1959, Senate Bill 52, para-  
graph 1. It is the fundamental principle of statutory construc-  
tion that an act of the Legislature, since it represents the  
will of the people, carries a presumption of constitutionality  
and should be recognized and enforced unless it is plainly and  
palpably a violation of the fundamental plan of the constitution.  
Bowman v. Kansas City, 233 SW2d 26.

The General Assembly of the State of Missouri in 1961  
amended Chapter 255, which applied to the Division of Resources  
and Development, to provide that effective October 13, 1961,

Mr. Lawrence A. Schneider

the duties and functions of the Division of Resources and Development are to be transferred to the new Division of Commerce and Industrial Development. Laws of Missouri 1961, page 240, Section 16, provides in part:

"2. All duties and functions otherwise provided by law to be performed by the division of resources and development shall hereafter be performed by the division of commerce and industrial development. The division of commerce and industrial development shall succeed to all other property, documents, records, assets and obligations of the division of resources and development.

"3. Insofar as practicable and desirable, all pending matters before the division of resources and development begun but not completed by that agency shall be completed by the division of commerce and industrial development."

1. Section 255.150 of the Revised Statutes of Missouri, 1959, provides as follows:

"The state division of resources and development is hereby designated as the official state planning agency for the purpose of providing planning assistance to counties, municipalities and metropolitan planning areas, and for such purposes is hereby authorized and empowered to:

"(1) Contract with public agencies or private persons or organizations for any of the purposes of sections 255.130 to 255.150;

"(2) Delegate any of its functions to any other state agency authorized to perform such functions, except that responsibility for such functions shall remain solely with the division;"

Mr. Lawrence A. Schneider

2. It is the opinion of this office that the Division of Commerce and Industrial Development is authorized under the existing state law to perform planning work in the area referred to in the application for the 701 Planning Grant for any county, municipality or metropolitan area when requested by it. The authority for this is contained in Section 255.130 of the Revised Statutes of Missouri, 1959, as follows:

"The state division of resources and development is hereby authorized, upon the request of the governing body of any county, municipality or metropolitan area in this state to:

"(1) Provide planning assistance (including planning surveys, land use studies, urban renewal plans, technical services, and other planning work, but excluding plans for specific public works) to and for any county or municipality, or metropolitan area.

"(2) Contract for, receive, and utilize any grants or other financial assistance made available by the federal government or from any other source public or private, for the purpose of sections 255.130 to 255.150."

3. Sections 255.130 and 255.140 of the Revised Statutes of Missouri, 1959, authorize the Division of Commerce and Industrial Development to contract with the Federal Government, and also with such county, municipality or metropolitan area, to provide the planning work. Section 255.130 of the Revised Statutes of Missouri, 1959, provides as follows:

"(2) Contract for, receive, and utilize any grants or other financial assistance made available by the federal government or from any other source public or private, for the purpose of sections 255.130 to 255.150."

Mr. Lawrence A. Schneider

4. Section 255.150 of the Revised Statutes of Missouri, 1959, provides as follows:

"All matching nonfederal funds required for any planning assistance undertaken by the state division of resources and development pursuant to sections 255.130 to 255.150 shall be provided by the county, municipality or metropolitan area requesting such planning assistance."

This section requires that all matching nonfederal funds required for this project be provided by the municipality or metropolitan area requesting such planning assistance.

#### CONCLUSION

It is, therefore, the opinion of this office:

The Division of Commerce and Industrial Development of the State of Missouri is the official State Planning Agency for the purpose of providing planning assistance to counties, municipalities and metropolitan planning areas.

The Division of Commerce and Industrial Development is empowered, in Chapter 255 of the Revised Statutes of Missouri, 1959, to fulfill the obligations imposed under the grant contract with the Federal government prescribing the terms and conditions thereof.

Section 255.150 provides, "All matching nonfederal funds required for any planning assistance undertaken by the state division of resources and development pursuant to sections 255.130 to 255.150 shall be provided by the county, municipality or metropolitan area requesting such planning assistance."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

EM:LT





December 6, 1963

Honorable Ralph B. Nevins  
Prosecuting Attorney  
Hickory County  
Hermitage, Missouri

Dear Mr. Nevins:

This is in response to your letter dated November 23, 1963, inquiring whether a Conservation Agent is authorized to inspect hunting permits under Section 252.060, RSMo 1959, and to arrest a person for refusal to exhibit his permit. It is indicated from your inquiry that the person arrested admitted having a hunting permit but refused to submit it to the agent for inspection.

In the case of State vs. Bennett, 288 S.W. 50, the Supreme Court held under the prior Fish and Game Law that by accepting a hunting permit the licensee subjected himself to the restrictions and limitations of the law and the regulations. The same reasoning should apply to the application of Section 252.060 as the Court applied to the inspection of game under the prior law. Moreover, printed on the back of each hunting and fishing permit are certain conditions agreed to by the licensee, to-wit: "To exhibit this permit for inspection \* \* \* upon demand to any officer authorized to enforce the rules pertaining to wildlife." Therefore, if the person arrested had a hunting license and refused to submit the same to the agent upon demand, it would appear he could properly be charged with violations of Section 252.060, RSMo 1959.

We are also enclosing herewith for your information an opinion of this office dated December 18, 1942, to Emory C. Medlin.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

December 18, 1963



Dr. George A. Ulett, Director  
Division of Mental Diseases  
722 Jefferson Street  
Jefferson City, Missouri

Dear Dr. Ulett:

This letter is in response to your recent inquiry as to the authority of the Division of Mental Diseases to implement a federally financed program to study and develop better care for the mentally ill and retarded of our State.

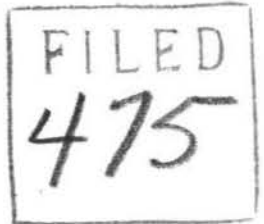
We note that pursuant to Public Laws 88-156 and 88-164, Governor Dalton has designated the Division of Mental Diseases of the Department of Public Health and Welfare of Missouri as the sole state agency in Missouri for carrying out these programs. It is our opinion that the Division of Mental Diseases is authorized by Chapter 202, RSMo 1959, to implement these programs as indicated in the Governor's executive order.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

CB:df



December 12, 1963

Mr. Maurice Schechter  
41 Country Fair Lane  
Creve Coeur 41, Missouri

Dear Senator Schechter:

We have your letter of November 27, 1963 in which you inquire whether a constitutional charter city having a council manager form of government can levy a license tax on newspaper distributors and carriers.

Sec. 71.610, RSMo 1959 reads as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specifically named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

Since there is no statute authorizing such a license tax, the question then boils down to whether same is authorized by the city charter. Interpretations of a city charter are best left up to the City Attorney and are not ruled upon by this office. However, I call your attention to the following cases which deal with the high degree of specificity necessary in a charter in order for the license tax to be valid. See *Siemens v. Shreeve*, 296 SW 415; *Keane v. Strodtman*, 18 SW 2d 896; *Lebanon v. Joslyn*, 58 SW 2d 289; *Overland v. Ranft*, 220 SW 2d 746.

I believe that if the attention of the City Attorney is directed to these cases, he will be able to evaluate the validity of the ordinance in light of his own city charter.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

BANKS:

NEWSPAPERS:

PUBLICATIONS:

LEGAL PUBLICATIONS:

Bank statement of condition made to Commission of Finance may be published by newspaper having circulation in town in which bank is located even though ~~every~~ newspaper published in different counties.



*Luskens*

December 30, 1963

Mr. Wayne Freeman  
Meramec Valley Transcript  
Pacific, Missouri

Dear Wayne:

Les Simpson called the office one day while I was away in St. Louis and made the following inquiry on your behalf.

It seems that a bank in Eureka, Missouri is about to publish a bank report in compliance with Sec. 362.295, RSMo 1959. Eureka is a town located in the Western portion of St. Louis County and it does not have a newspaper published in said town. Your question was whether the Eureka bank could publish said bank report in your paper in Pacific (Franklin County) or must same be published in some newspaper in St. Louis County?

Sec. 362.295 reads in part as follows:

"Every such report, exclusive of the verification, shall, within thirty days after it shall have been filed with the commissioner, be published by the bank in one newspaper of the place where its place of business is located, or if no newspaper is published there in a newspaper of general circulation in the town and community in which the bank is located;"

Since there is no newspaper in Eureka, the only requirement is that the report be published "in a newspaper of general circulation in the town and community in which the bank is located."

*(There is no original request)*



Mr. Wayne Freeman - 2.

December 30, 1963

Pacific and Eureka are but seven miles apart. Hence, I am assuming that the Moramee Valley Transcript has a fairly wide distribution in Eureka. If this be the case, I think it would be perfectly proper for the Eureka bank to publish the report in said newspaper.

Yours very truly,

THOMAS F. HADLETON  
Attorney General